87-699

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF MARYLAND AND DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THE STATE OF MARYLAND,

Petitioners,

v.

CHARLES ANDERSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

J. JOSEPH CURRAN, JR.,
Attorney General
State of Maryland,

C. FREDERICK RYLAND,*
SUSAN SUGAR NATHAN
Assistant Attorneys General,

ROBERT T. FONTAINE,
Special Attorney,

300 West Preston Street,
Suite 302,
Baltimore, Maryland 21201,
(301) 225-1846,

Counsel for Petitioners.

Counsel of Record

The Daily Record Co., Baltimore, MD 21202

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Does the ex post facto clause prohibit a statutory change in procedures by which a person, found insane under prior laws and committed to a mental health facility, obtains release?

PARTIES TO THE PROCEEDING

The following are named as parties to the proceeding in the Court of Appeals of Maryland:

Department of Health and Mental Hygiene for the State of Maryland, the State of Maryland[1] and Charles Anderson.

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[1] Under Maryland law, the committed individual, the State's Attorney and the Department of Health and Mental Hygiene are entitled to separate representation in release proceedings for individuals found not criminally responsible by reason of insanity. Maryland Health-General Code Annotated §12-114(e)(6) (1982 Volume and 1987 Supp.) At all times in this proceeding, the interests of the State of Maryland and of the Department of Health and Mental Hygiene have been congruent. They have both been represented by the Office of the Attorney General for the State of Maryland.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO.

THE STATE OF MARYLAND, DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THE STATE OF MARYLAND, et al., Petitioners

v.

CHARLES ANDERSON, Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

Petitioners, Department of Health and Mental Hygiene of the State of Maryland and the State of Maryland, respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Maryland, which reversed the judgment of the Maryland intermediate appellate court, the Court of Special Appeals, and remanded the case with the directions to reverse the judgment of the Circuit Court for Baltimore City and to remand the case to the Circuit

Court for Baltimore City for further proceedings.

DECISIONS BELOW

The opinion of the Court of Appeals of the State of Maryland, reproduced in Appendix A at 1A, is reported at 310 Md. 21, 528 A.2d 904 (1987).

The opinion of the intermediate appellate court, the Court of Special Appeals of Maryland, is reproduced in Appendix B at 34A. It is reported at 64 Md. App. 674, 498 A.2d 679 (1985).

The opinion of the Circuit Court for Baltimore City has not been reported. The opinion and the judgment of the Circuit Court is reproduced in the Appendix C at 54A.

JURISDICTION

The judgment of the Court of Appeals of the State of Maryland was entered on July 30, 1987. This Petition is filed within 90 days of that date. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257(3).

The judgment of the Court of Appeals of the State of Maryland is a final judgment of the question presented by this petition. The issue of the application of ex post facto prohibitions to individuals under insanity commitments has been authoritatively decided by the highest court of Maryland.[2]

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[2] Argument may be advanced, in opposition to this petition, that the Maryland Court of Appeals decision is not a final judgment in this case. This is incorrect. Requiring the petitioners to await the remand of the case and raise anew issues already governed by the law of the case on a new set of appeals would be wasteful of both state and federal judicial resources. This Court has construed finality so as not to require these fruitless steps. Pennsylvania v. Ritchie, ___ U.S. ___, 55 U.S.L.W. 4180, 4182 ft. 7 (February 24, 1987); Cox Broadcasting Corp. v. Cohn, 420 (cont'd)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case rests on interpretation of Article 1, Sections 9 and 10 of the Constitution of the United States, which provide, in pertinent part, as follows:

> Section 9.
>
> ... No Bill of Attainder or ex post facto Law shall be passed.
>
> ...
>
> Section 10.
>
> ... No State shall ... pass any ... ex post facto Law, ...

The Maryland constitutional provision, found in its Declaration of Rights, reads as follows:

> Article 17. Ex post facto laws; retrospective oaths or restrictions.
>
> That restrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty;

U.S. 469 (1975).

> wherefore, no ex post facto Law ought to be made; nor any retrospective oath or restriction be imposed, or required.

Maryland statutory provisions on commitment of individuals found insane, in effect both pre July 1, 1984 and subsequent to July 1, 1984, are incorporated in Appendix F at 81A.

STATEMENT OF THE CASE

Charles Anderson ("Anderson") was found insane of first degree murder on April 8, 1981. He was subsequently committed to a mental health facility operated by the Maryland Department of Health and Mental Hygiene for inpatient care and treatment.

Effective July 1, 1984, the Maryland Legislature changed the procedures by which a person committed to a mental health facility after a finding of insanity obtains release. Specifically, when that person seeks release through an Administrative Hearing, the burden of persuasion has been shifted from the State to the person.[3]

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[3] Under prior Maryland law, after an initial hearing, a person committed to a State mental health facility after a finding of insanity (the "patient") had the opportunity to seek periodic review to determine the need for continued confinement. The patient could seek release either through an administrative proceeding with judicial review or through a civil judicial release proceeding, either with or without a jury.
(cont'd)

On October 11, 1984, Anderson filed an application for release through an

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When a patient chose the judicial trial option, the patient had the burden of proving by a preponderance of the evidence the fitness for release. Maryland Health-General Code Annotated, §12-114(c) (1982), Appendix F at 84A. Dorsey v. Solomon, 604 F.2d. 271 (4th Cir. 1979).

In the administrative hearing option, the state and the department had the procedural burden of proving by clear and convincing evidence that the patient met the criteria for retention. Maryland Health-General Code Annotated, §12-113(b)(1) (1982), Appendix F at 84A.

After John Hinckley's attempted assassination of President Ronald Reagan, the Maryland Governor convened a task force to study laws pertaining to persons found insane, including both the initial commitment and subsequent release procedures. Based on the recommendations of that task force, the 1984 Maryland Legislature made substantial revisions in Maryland's law affecting such individuals. 1984 Maryland Laws Chapter 501. In the area of release, while both the administrative hearing and judicial trial release options were continued, the burden of proving release eligibility in administrative hearings was shifted to be the same as the burden already existing in the judicial proceedings -- the patient now has the burden of proof by a preponderance of the evidence. Maryland Health-General Code Annotated, §12-118 (Supp. 1987).

administrative hearing with judicial review. On November 21, 1984, the Circuit Court for Baltimore City granted Anderson's request for an administrative hearing and ordered that the hearing be governed by Maryland Health-General Code Annotated, §12-113 (Supp. 1984), which became effective in July of that year. Anderson filed a "Motion to Strike Consent" claiming that the law in effect prior to the date should be applied in his case.

Anderson's motion was denied by the Baltimore City Circuit Court in a memorandum, opinion and order dated March 7, 1985. Appendix C at 54A. The administrative hearing was subsequently conducted on March 21, 1985. The department's hearing officer required Anderson to establish his eligibility for release by a preponderance of the evidence under Maryland Health-General Code Annotated, §12-113(d) (Supp. 1984).

Following receipt of the hearing officer's report and Anderson's exceptions to that report, the Circuit Court continued Anderson's commitment to the Department of Health and Mental Hygiene for care and treatment in an order dated June 4, 1985. Appendix D at 78A.

The Court of Special Appeals granted Anderson leave to appeal, and affirmed the order of the Circuit Court for Baltimore City finding that the application of the current law to Appellant does not violate the ex post facto clause because the purpose of commitment is treatment. Anderson v. Department of Health and Mental Hygiene, 64 Md. App. 674, 498 A.2d 679 (1985). Appendix B at 34A.

The Maryland Court of Appeals granted Anderson's Petition for Writ of Certiorari on January 6, 1986. Following oral argument on April 3, 1986, the Maryland Court of Appeals

issued its decision on July 30, 1987. It held that the statutory change violated the ex post facto clause because Anderson's commitment to a mental health facility was a consequence of a criminal act. Appendix A at 1A. Anderson v. Department of Health and Mental Hygiene, 310 Md. 217, 528 A.2d 904 (1987). Chief Judge Murphy and Judge Rodowsky dissented on the grounds that Anderson's commitment is for treatment, that punishment of those found insane is legislatively proscribed, and that, therefore, the ex post facto clause was not applicable. 310 Md. at 231. Appendix A at 29A.

PRESERVATION OF THE FEDERAL QUESTION IN STATE COURT PROCEEDINGS

At each stage in the proceedings, the central legal question of this case has been whether the federal ex post facto clause prohibits a statutory change in release procedures applicable to persons found insane and committed under prior statutes.

The Maryland Circuit Court determined that "a law is only ex post facto if its purpose is punishment ... The new law has treatment as its objective." Appendix C at 69A. The Court therefore concluded "... that the ex post facto Laws of the federal and state Constitutions are not violated."[4] Appendix C at 73A-74A.

Anderson appealed from the decision of

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[4] Based on the Circuit Court's direction, an administrative hearing was held under the new statute. The Circuit Court subsequently ordered that Anderson's commitment to the Department of Health and Mental Hygiene be continued. Appendix D at 78A-79A.

the Circuit Court. His Application for Leave to Appeal to the Court of Special Appeals states: "It was a constitutionally prohibited application of ex post facto law for the lower court to require Mr. Anderson to prove his eligibility for release by a preponderance of the evidence." Appendix E at 82A.

The Court of Special Appeals therefore again considered whether the ex post facto clause prohibited the application of the new statute to Mr. Anderson. It determined that the ex post facto clause applied only where the purpose of confinement was punishment. It further found that the purpose of confinement after the finding of insanity was treatment, even though it is certainly a consequence of his criminal act. Therefore, it held that the ex post facto clause was not violated. Appendix B at 53A.

The same issue was raised in the Court

of Appeals. That Court stated:

> "[Anderson] contends that, because the burden of proof provisions for release were changed subsequent to his criminal activity, application of Chapter 501's new burden of proof provision to his administrative release hearing would operate to his disadvantage and, therefore, would violate the Federal and State Constitutional prohibition against ex post facto Laws. The State, while not disputing that the change in the burden of proof operates to Anderson's disadvantage, contends that the ex post facto prohibition is inapplicable because his confinement in a mental hospital does not constitute 'punishment.'"

310 Md. at 223. Appendix A at 11A. The Court of Appeals concluded that, because Anderson's treatment in a mental health facility was a "consequence" of his criminal act, "we believe that the confinement does implicate the ex post facto prohibition." Anderson, 310 Md. at 230. Appendix A at 28A. The Court of Appeals therefore reversed the holding that the pre-existing law should have been applied.

REASONS FOR GRANTING THE WRIT

SUPREME COURT CASES HAVE PRESENTED CONFLICTING POSITIONS AS TO WHETHER THE EX POST FACTO PROHIBITION APPLIES TO ALL CONSEQUENCES OF A CRIMINAL ACT OR ONLY TO THOSE CONSEQUENCES THAT AFFECT PUNISHMENT.

This case presents an important question of federal law[5] about which the state courts and lower federal courts require guidance. That question is whether the ex post facto clause applies to statutes governing the release of persons committed to mental health facilities after a finding of insanity.

These individuals are in such facilities for the purpose of treatment. The services received by the individual are derived exclusively from a plan created by an

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[5] The Maryland Court of Appeals acknowledged that the Maryland Declaration of Rights ex post facto clause is "viewed as having the same meaning as the federal prohibition." Anderson, 310 Md. 217, (1987); Appendix A at 12A.

interdisciplinary team of mental health profesionals. The plan, approved by the treating psychiatrist, determines the individual's daily treatment regimen. Further, the length of treatment and the corresponding length of placement within the hospital is determined, not by the crime committed, but instead by the degree of improvement in the individual's mental condition.

The Maryland trial court and intermediate appellate court, as well as the chief judge and another judge of the Court of Appeals (in dissent), read this Court's cases on the ex post facto clause and determined that the clause was not applicable because punishment was not involved. A majority of the Maryland Court of Appeals read the same cases and disagreed because Anderson's commitment is a consequence of a criminal act; yet they too recognized conflict in the

positions presented by those cases.

The Maryland Court observed:

> "At times, the Supreme Court has said that the change in consequences must be penal or punitive or must enhance punishment for the ex post facto prohibition to be implicated. ... More often, however, the Court has emphasized that the prohibition embraces consequences affecting substantial rights if they 'disadvantage the offender' or are 'more onerous.'"[6]

Anderson, supra, 310 Md. at 226; Appendix A at 18A (citations omitted).

The Maryland Court of Appeals derived support for the broader "all consequences" interpretation from cases dated in the 1800s. As construed by the Maryland Court, Kring v. Missouri, 107 U.S. 221 (1883) states

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[6] The Maryland Court further stated "[i]t has been intimated that the Supreme Court's ex post facto opinions do not represent a model of consistency. See e.g. Lawrence H. Tribe, American Constitutional Law §103 (1978); Van Tine, Parole Guidelines as Ex Post Facto Laws, 62 B.U.L. Rev. 515-535 (1982). See also United States v. Kowal, 596 F.Supp. 375 (D. Conn. 1984)." Anderson 310 Md. at 226; Appendix A at 21A.

that "the prohibition extends broadly to 'any law passed after the commission of an offense which ... in relation to that offense, or its consequences, alters the situation of a party to his disadvantage.'" Anderson, 310 at 224 citing Kring, 107 U.S. at 235; Appendix A at 13A.

The Maryland Court also substantially relied upon In Re Medley, 134 U.S. 160 (1890): "any law which was passed after the commission of the offense ... is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed ... or which alters the situation of the accused to his disadvantage". Anderson, 310 Md. at 226, 227, citing In Re Medley, 134 U.S. at 171; Appendix A at 20A.[7]

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[7] The broader interpretation attributed to these cases by the Maryland Court is in fact dicta. Both of these cases concerned punishment. They did not concern any other (cont'd)

In contrast, the recent ex post facto cases, also cited by the Maryland Court, clearly state that that clause applies only to punishment. Weaver v. Graham, 450 U.S. 24 (1981), concerns the calculation of "gain time." Thus, only the length of sentence (punishment) was involved. Weaver repeatedly states that the ex post facto prohibition is implicated only where punishment is at issue: "The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" Weaver, 450 U.S. at 28, citing Cummings v. Missouri, 4 Wall. 77, 325 through 326, 18 L.Ed. 356 (1867).[8]

"consequence." Thus, the Maryland Court is extrapolating from dicta.

[8] See also Weaver, 450 U.S. at 30 ("The ex post facto prohibition ... forbids the (cont'd)

This Court's most recent construction of the ex post facto clause again reflects the narrower interpretation that it applies only to changes in punishment. Miller v. Florida, ___ U.S. ___, 107 S.Ct. 2446 (1987), reviewed sentencing guidelines. Again, punishment, not other "consequences", was implicated. This Court reiterated: "almost from the outset, we have recognized that central to the ex post facto prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature **INCREASES PUNISHMENT** beyond what was prescribed when the crime was consummated." Miller, 107 S.Ct. at 2451 (emphasis added),

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imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred."); 450 U.S. at 32 (referring to the "judge's calculation of the sentence to be imposed."); 450 U.S. at 33 (referring to the "quantum of punishment"); and 450 U.S. at 36 (determining that the statute "runs afoul of the prohibition against ex post facto laws" because it "makes more onerous the punishment for crimes committed before its enactment.").

citing Weaver v. Graham, 450 U.S. 24, 30 (1981). Miller again determined that the ex post facto clause prohibited the change in legislation because "[t]he law ... 'makes more onerous the punishment for crimes committed before its enactment.'" Miller, 107 at 2454, citing Weaver, 450 U.S. at 36.

The Maryland Court chose one of two co-existing and conflicting interpretations of the ex post facto clause. Because this conflict exists, the Maryland Court was allowed to strike down a statute that changed an individual's burden of persuasion where he sought release, not from the confines of punishment, but from a mental health facility where he is committed for treatment."[9] Only

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[9] The Maryland Court acknowledged that the purpose of Anderson's commitment is treatment.

> It is true that the [Maryland] General Assembly does not deem commitment to a mental hospital, as a result of a criminal case, to be the imposition of "criminal

(cont'd)

the Supreme Court can resolve this conflict.

Resolution by this Court is even more important because it affects other jurisdictions besides Maryland. In the wake of John Hinckley's attempted assassination of President Ronald Reagan, other states as well as the federal government -- the jurisdiction where Hinckley is now committed -- have enacted statutes shifting the burden of proof to committed individuals, previously found insane, when those individuals seek

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responsibility." In addition, the purposes of the commitment are treatment and the protection of society against dangerous individuals. Anderson 310 Md. at 228; Appendix A at 23A.

It is also noted, however, that Anderson was committed to a hospital that is a maximum security facility that also received prison inmates who are in need of mental health treatment. Because some Supreme Court cases indicate that the ex post facto clause applies to all consequences of a criminal act, the Maryland Court did not reach a conclusion as to whether the confinement was punitive in nature.

release.[10] Resolution of this issue is therefore of significant public importance and may only be achieved by this Court.

CONCLUSION

The Maryland Court of Appeals has decided an important question of Federal law -- when the ex post facto prohibition applies. Further, that Court has decided the question in a manner that conflicts with this Court's most recent decisions and relies exclusively on dicta from this Court's decisions of many years ago. A grant of

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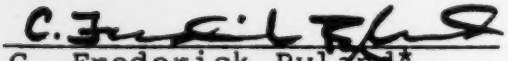
[10] In fact, if the federal courts were to adopt the Maryland Court of Appeals' interpretation of the ex post facto clause, it would prohibit the Federal Insanity Defense Reform Act of 1984 from applying in the case of Hinckley, as well as others committed prior to October 12, 1984. Compare District of Columbia Code §24-301(d)-(e) (burden on committed person to prove entitlement to release by a preponderance of the evidence) with 18 U.S.C. §4243 (1987 Supp.) (burden on individual who commits offense involving bodily injury to prove lack of substantial risk by clear and convincing evidence).

certiorari in this case is therefore both essential and in the public interest.

WHEREFORE, for the foregoing reasons, this petition should be granted and a writ of certiorari issued to review the judgment and opinion of the Court of Appeals of the State of Maryland.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF
MARYLAND



C. Frederick Ryland*
Susan Sugar Nathan
Assistant Attorneys General
Robert T. Fontaine
Special Attorney
Suite 302
300 West Preston Street
Baltimore, Maryland 21201
(301) 225-1846

Counsel for Petitioners

*Counsel of Record

APPENDIX

APPENDIX A:

DECISION OF THE COURT OF APPEALS OF MARYLAND DATED JULY 30, 1987

528 A.2d 904

Charles ANDERSON

v.

DEPARTMENT OF HEALTH AND MENTAL HYGIENE et al.

No. 137, Sept. Term, 1985.

Court of Appeals of Maryland.

July 30, 1987.

George E. Burns, Jr., Asst. Public Defender (Alan H. Murrell, Public Defender, on the brief) Baltimore, for appellant.

Susan Sugar Nathan, Asst. Atty. Gen. (Stephen H. Sachs, Atty. Gen., Baltimore, and C. Frederick Ryland, Sp. Atty., Clifton T. Perkins Hosp., Jessup, on the brief), for appellee.

Argued before MURPHY, C. J., and SMITH,* ELDRIDGE, COLE, RODOWSKY, COUCH* AND McAULIFFE, JJ.

ELDRIDGE, Judge.

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* SMITH, J., and COUCH, J., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and adoption of this opinion.

I.

Charles Anderson, at the conclusion of his first degree murder trial, was found "not guilty by reason of insanity"[1] on April 8, 1981. The Criminal Court of Baltimore ordered him to the custody of the Department of Health and Mental Hygiene for an examination and evaluation to determine whether he should be confined in a mental hospital. In accordance with the recommendation of the Department, the court committed Anderson on April 21, 1981, to the Clifton T. Perkins Hospital Center.

Three years later, on October 11, 1984,

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[1] In Langworthy v. State, 284 Md. 588, 599 n. 12, 399 A.2d 578 (1979), this Court pointed out that this terminology was "a holdover from common law concepts and prior statutory provisions regarding insanity and the commission of crimes" and did not properly refer to the trial court's finding that defendant was guilty of the crime charged but insane when he committed the crime. See, in addition, Ford v. Ford, 307 Md. 105, 113-118, 512 A.2d 389 (1986); Pouncey v. State, 297 Md. 264, 465 A.2d 475 (1983).

Anderson applied to the Circuit Court for Baltimore City for an administrative release hearing, asserting that he "no longer meets the standards for commitment to a mental institution." The circuit court granted Anderson's request for an administrative hearing but ruled "that defendant's administrative hearing shall be conducted under the standard of Maryland's new law on incompetency and criminal responsibility, effective July 1, 1984." Specifically, the portion of the new law which the circuit court held applicable provides that the individual seeking release should bear the burden of proof in the administrative proceeding. Previously, the State had borne this burden of proof. Anderson had argued that applying the new law to him would violate the constitutional prohibition against ex post facto laws, but the circuit court rejected the argument. Anderson

appealed to the Court of Special Appeals which affirmed. Anderson v. Dep't of Health & Mantal Hyg., 64 Md. App. 674, 498 A.2d 679 (1985). The appellate court held that the ex post facto prohibition was inapplicable because the purpose of Anderson's confinement "was solely for 'in-patient care or treatment' ... [and] not a penal or punitive consequence" of the criminal act, 64 Md. App. at 693-694, 498 A.2d 679. Thereafter we issued a writ of certiorari to determine whether the application to Anderson of the new burden of proof provision would violate the prohibition against ex post facto laws.

II.

The relevant statutory background is as follows. In 1982 the Governor created a "Task Force to Review the Defense of Insanity" in criminal cases. Enacted pursuant to the report of the Task Force,

Chapter 501 of the Acts of 1984, effective July 1, 1984, altered certain aspects of the insanity defense laws.[2]

Prior to July 1, 1984, upon a plea of insanity and introduction of sufficient evidence to raise an issue as to the defendant's sanity, the State had the burden of proving, beyond a reasonable doubt, that the defendant was sane at the time of the criminal activity. Bradford v. State, 234 Md. 505, 200 A.2d 150 (1964). See Trimble v. State, 300 Md. 387, 394 n. 1, 478 A.2d 1143 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1231, 84 L.Ed.2d 368 (1985); State v.

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[2] The insanity defense laws in effect when Anderson committed the crime were set forth in Maryland Code (1957, 1979 Repl. Vol, 1980 Cum. Supp.), Art. 59, §§ 23 through 28. By Ch. 21 of the Acts of 1982 the General Assembly recodified these provisions into title 12 of the Health-General Article. Pursuant to Ch. 501, the laws relating to insanity as a defense in criminal cases are now contained in Code (1982, 1986 Cum. Supp.), §§ 12-101 through 12-121 of the Health-General Article.

Pratt, 284 Md. 516, 524, 398 A.2d 421 (1979); State v. Evans, 278 Md. 197, 209 n. 2, 362 A.2d 629 (1976); Fowler v. State, 237 Md. 508, 511-513, 206 A.2d 802 (1965).

Thereafter, if the State failed to prove sanity beyond a reasonable doubt and the trial court found the accused guilty of the crime charged but insane at the time of the offense, Maryland Code (1982), § 12-110 of the Health-General Article, required the trial court immediately to

> "[c]ommit the individual to the Department for an examination and evaluation to determine whether the individual:
> (i) Is mentally retarded or has a mental disorder; and
> (ii) Because of mental retardation or a mental disorder, would be a danger to the individual or the person or property of another, if released from confinement ...."

This initial commitment was only for a limited time for the purpose of examination and evaluation. This was followed by a hearing at which the State was required to

prove by clear and convincing evidence that the criminal defendant met the standards for indefinite commitment. See § 12-113(b) and (c) of the Health-General Article (1982); Comment to § 12-113 of the Health-General Article (1986 Cum. Supp.).

Once committed for an indefinite period, a defendant could periodically request to be released. He could choose either an administrative proceeding with judicial review, or a direct statutory judicial proceeding, or a habeas corpus proceeding. Section 12-114(c) authorized the direct judicial release proceeding, either with or without a jury, at which the criminal defendant had the burden of proving by a preponderance of the evidence his fitness for release. The habeas corpus proceeding was provided for in § 10-804. Section 12-114(b) authorized the administrative release hearing before the Department at which, prior to July

1, 1984, the State had the burden of proving by clear and convincing evidence that the criminal defendant should continue to be confined. See Salinger v. Superintendent, 206 Md. 623, 629-631, 112 A.2d 907 (1955); Dorsey v. Solomon, 604 F.2d 271, 273-275 (4th Cir. 1979); Daniels v. Superintendent, 34 Md. App. 173, 366 A.2d 1064 (1976).

Ch. 501 of the Acts of 1984 abolished the rule that in the criminal trial the State had the burden of establishing the defendant's sanity. Section 12-109 of the Health-General Article (1986 Cum. Supp.) now provides:

> "(b) Burden of Proof. -- The defendant has the burden to establish, by a preponderance of the evidence, the defense of not criminally responsible."

Chapter 501 also eliminated the initial commitment examination and hearing procedures; instead it contained an automatic commitment requirement. Section 12-111(a)

provides that "after a verdict of not criminally responsible, the court immediately shall commit the defendant to the Department for institutional, inpatient care or treatment." This automatic commitment continues indefinitely until the criminal defendant prevails at an administrative proceeding or a judicial release hearing or obtains a writ of habeas corpus.

Lastly, Ch. 501 abolished the requirement that, in an administrative release hearing, the State has the burden of proving the necessity for the criminal defendant's continued commitment. Section 12-113(d) now places the burden of proof on the defendant to show by a preponderance of the evidence that he no longer meets the standards for commitment. Thus, under the new statute, the criminal defendant must prove his eligibility for release whether in a judicial proceeding or an administrative

proceeding.[3]

Additionally, Ch. 501 contained a section expressly dealing with the applicability of its provisions to various situations where the criminal act occurred prior to Ch. 501's effective date of July 1, 1984. Section 4 of the statute stated, inter alia, that the new provisions would apply to a criminal defendant adjudicated insane "who is under commitment to the Department of Health and Mental Hygiene on or after the effective date of this Act ...."

III.

In challenging the decisions of both courts below, Anderson relies solely on the

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[3] Chapter 501 made other amendments to the insanity defense laws which are not relevant to this case. See e.g., § 12-112(c) (inclusion of data in central computer on insanity committees to "prevent crime and protect the public"); §12-121(b) (burden of proof now on individual when requesting changes in conditions of a conditional release).

ex post facto clauses of the federal and state constitutions. See Constitution of the United States, Art. I, § 10, cl. 1; Maryland Declaration of Rights, Art. 17. He contends that, because the burden of proof provisions for release were changed subsequent to his criminal activity, application of Ch. 501's new burden of proof provision to his administrative release hearing would operate to his disadvantage and, therefore, would violate the federal and state constitutional prohibitions against ex post facto laws. The State, while not disputing that the change in the burden of proof operates to Anderson's disadvantage, contends that the ex post facto prohibition is inapplicable because his confinement in a mental hospital does not constitute "punishment."

It has, of course, been settled since the Supreme Court's decision in Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798), that

the federal ex post facto prohibition relates only to criminal or penal laws or the consequences of an offense. See, e.g., Miller v. Florida, ____ U.S. ____, 107 S. Ct. 2446, 96 L.Ed.2d 351 (1987); Weaver v. Graham, 450 U.S. 24, 28-30, 101 S. Ct. 960, 964-965, 67 L.Ed.2d 17 (1981); Corley v. Moore, 236 Md. 241, 243, 203 A.2d 697 (1964); Lynn v. State, 84 Md. 67, 78, 35 A. 21 (1896); Anderson v. Baker, 23 Md. 531, 581-582, 605-606, 624-625 (1865); Baugher v. Nelson, 9 Gill. 299, 305 (1850). The same is true of the ex post facto clause in the Maryland Declaration of Rights, which has been viewed as having the same meaning as the federal prohibition. See, e.g., Spielman v. State, 298 Md. 602, 608-609, 471 A.2d 730 (1984); Tichnell v. State, 287 Md. 695, 735-736, 415 A.2d 830 (1980); Elliott v. Elliott, 38 Md. 357, 362 (1873); Baugher v. Nelson, supra, 9 Gill. at 306[4]

While the ex post facto prohibition relates only to criminal offenses, the Supreme Court has enunciated the principle that the prohibition extends broadly to "any law passed after the commission of an offense which ... ' in relation to that offense, or its consequences, alters the situation of a party to his disadvantage.'" Kring v. Missouri, 107 U.S. 221, 235, 2 S. Ct. 443, 455, 27 L.Ed. 506 (1883), quoting Justice Washington in United States v. Hall, 2 Wash. C.C. 366, 26 Fed. Cas. 84, 86 (Case No.

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[4] It is noteworthy that the Maryland Declaration of Rights, in 1776, was the first bill of rights to contain a constitutional prohibition against ex post facto laws. H.H. Walker Lewis, The Maryland Constitution -- 1776, p. 45 (1976); Bernard Schwartz, The Bill of Rights: A Documentary History, p. 279 (N.Y. 1971). The Maryland Constitution of 1776 was initially drafted in August of that year by a committee of seven men, one of whom was Samuel Chase. Lewis, supra, at p. 37; Schwartz, supra, at p. 279. Chase later became a justice of the Supreme Court of the United States, and was the author if the principal opinion in Calder v. Bull, supra, 3 Dall. at 386-395.

15,285) (1809) (emphasis added). The Supreme Court has also pointed to "the liberal construction which this court ... [has given] to the words ex post facto law, -- a construction in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation." Kring v. Missouri, supra, 107 U.S. at 229, 2 S. Ct. at 450.

Under the pertinent provisions of Maryland law as construed by this Court in Pouncey v. State, 297 Md. 264, 465 A.2d 475 (1983), and Langworthy v. State, 284 Md. 588, 399 A.2d 578 (1979), it is clear that Anderson's confinement in a state mental institution is a direct consequence of adjudication at his criminal trial that he was guilty of committing a crime but insane at the time of the crime. Langworthy v. State, supra, 284 Md. at 594, 597-598, 399

A.2d 578. The commitment is not simply a consequence of the insanity finding, as "a person, whether sane or insane," may not be committed for an offense of which he has been acquitted. Id. at 593, 399 A.2d 578. In such event, the accused ... walks out of the courtroom a free man." Id. at 593-594, 399 A.2d 578. Instead, the commitment to the mental hospital is the "disposition" portion of the judgment in the criminal case, which is "composed of the verdict that he committed the criminal act charged and the disposition of him, as a final judgment." Id. at 597, 399 A.2d 578. See also §§ 12-109 and 12-111 of the Health-General Article.

Moreover, the imposition upon the criminal defendant of the burden of proof in the administrative release proceeding, under § 12-113(d) of the Health-General Article as enacted by Ch. 501 of the Acts of 1984, is also a direct consequence of the judgment at

the criminal trial that the defendant committed the criminal act but was insane. New § 12-113(d), imposing the burden of proof upon the person seeking administrative release, relates only to those who have been found guilty of committing the criminal act charged but insane. See § 12-109(c). Where an individual, because of an alleged mental disorder, has come into the custody of the Department of Health and Mental Hygiene through a different route than a judgment in a criminal case, the burden of proof at his administrative release hearing is upon the Department. See § 10-806 of the Health-General Article; COMAR 10.21.01.07H and 10.21.01.02B(7).

Furthermore, the fact that a particular proceeding or matter is labelled "civil" rather than "criminal" does not necessarily remove it from the ambit of the ex post facto prohibition. See, e.g., Burgess v. Salmon,

97 U.S. (7 Otto) 381, 384-385, 24 L.Ed. 1104 (1878) ("the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal"); Cummings v. The State of Missouri, 4 Wall. 277, 325, 327-329, 18 L.Ed. 356 (1867). Similarly, a change in the law which is deemed "procedural" is not necessarily exempt from the ex post facto prohibition if the change affects substantial rights. Kring v. Missouri, supra, 107 U.S. at 232, 2 S.Ct. at 452 ("it is obvious that a law which is one of procedure may be obnoxious as an ex post facto law"). See, e.g., Weaver v. Graham, supra 450 U.S. at 29 n. 12, 101 S. Ct. at 964 n. 12; Thompson v. Utah, 170 U.S. 343, 354-355, 18 S. Ct. 620, 624, 42 L.Ed. 1061 (1898). A change in the law which imposes the burden of proof upon the individual has been held to be within the ex post facto prohibition. See, e.g., Cummings v. The

State of Missouri, supra, 4 Wall. at 328; United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973).

On the other hand, not every law passed after the commission of an offense, which changes the consequences of that offense, is barred by the ex post facto prohibition. Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L.Ed.2d 344 (1977); Malloy v. South Carolina, 237 U.S. 180, 35 S. Ct. 507, 59 L.Ed. 905 (1915). At times, the Supreme Court has said that the change in consequences must be penal or punitive or must enhance the punishment for the ex post facto prohibition to be implicated. See e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 594, 72 S. Ct. 512, 521, 96 L.Ed. 586 (1952) ("that which it [the ex post facto prohibition) forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its

enactment," and "[d]eportation, however severe its consequences," does not fall within the prohibition). More often, however, the Court has emphasized that the prohibition embraces consequences affecting substantial rights if they "disadvantage the offender" or are "more onerous." Miller v. Florida, supra, ___ U.S. at ___, 107 S. Ct. at 2452 (retroactive change in sentencing guidelines prohibited by ex post facto clause); Weaver v. Graham, supra, 450 U.S. at 29, 33, 101 S. Ct. 964, 966-967 (statute which "reduces the number of monthly gain-time credits available to an inmate who abides by prison rules" is "disadvantageous to petitioner and other similarly situated prisoners" and thus violates the ex post facto clause); Lindsey v. Washington, 301 U.S. 397, 401-402, 57 S. Ct. 797, 799, 81 L.Ed. 1182 (1937) ("We need not inquire whether this is technically an increase in

the punishment annexed to the crime .... It is plainly to the substantial disadvantage of petitioners ...); In re Medley, 134 U.S. 160, 171, 10 S. Ct. 384, 387, 33 L.Ed. 835 (1890) ("any law which was passed after the commission of the offense ... is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed ... or which alters the situation of the accused to his disadvantage") (emphasis supplied).

In the present case, the State, relying chiefly upon a series of decisions holding that the ex post facto prohibition does not preclude retroactive laws authorizing the deportation of aliens who have committed offenses,[5] argues that the ex post facto

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[5] Marcello v. Bonds, 349 U.S. 302, 314, 75 S. Ct. 757, 764, 99 L.Ed. 1107 (1955); Galvan v. Press, 347 U.S. 522, 529-532, 74 S. Ct. 737, 742-743, 98 L.Ed. 911 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 593-596, 72 S. Ct. 512, 520-522, 96 L.Ed. 586 (1952).

clauses are inapplicable to changes in the law relating to the "civil" consequences of a criminal act or the consequences of a criminal act which do not constitute "punishment." (State's brief, pp. 8-10). The State points out that the administrative release proceeding is "civil," and it contends that the purpose of Anderson's confinement is "clearly to provide treatment not punishment." (Id. at pp. 9-11). Nevertheless, as discussed above, Supreme Court opinions both before and after the deportation cases have suggested that the scope of the ex post facto prohibition is broader than that urged by the State.[6] These

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[6] It has been intimated that the Supreme Court's ex post facto opinions do not represent a model of consistency. See e.g., Lawrence H. Tribe, American Constitutional Law § 10-3 (1978); Van Tine, Parole Guidelines As Ex Post Facto Laws, 62 B.U.L. Rev. 515, 530-535 (1982). See also United States v. Kowal, 596 F.Supp. 375, 377 (D.Conn. 1984).

Probably the broadest view of the ex post facto prohibition was set forth by Chief (cont'd)

opinions indicate that a law passed after the commission of a criminal act, affecting substantial rights, and changing the consequences of having committed the criminal act in a way that is disadvantageous to the defendant, falls within the ex post facto prohibition.

Assuming, however, that the post trial consequence of the criminal act must constitute "punishment for the ex post facto prohibition to be implicated, the concept of punishment is broader than a prison sentence or a fine. Recently this Court held that a change in the law, expanding the class of eligible recipients of restitution payments awarded in criminal cases, is covered by the ex post facto prohibition. Spielman v. State, supra 298 Md. at 609-610, 471 A.2d 730. In Spielman we specifically rejected

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Justice Marshall in Fletcher v. Peck 6 Cranch 87, 138, 3 L.Ed. 162 (1810).

the State's contention that "the amended statute does not violate the prohibitions against ex post facto laws because restitution is not punishment," id. at 609, 471 A.2d 730.

It is true that the General Assembly does not deem commitment to a mental hospital, as a result of a criminal case, to be the imposition of "criminal responsibility." In addition, the purposes of the commitment are treatment and the protection of society against dangerous individuals. Nonetheless, these same considerations are included among the purposes for which convicted persons are sentenced to correctional institutions.[7]

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7 The constitutional justification for commiting the criminal defendant found to have been insane, without an initial hearing on his dangerousness, is the adjudication that he committed a criminal act. See Jones v. United States, 463 U.S. 354, 364, 103 S. Ct. 3043, 3049-3050, 77 L.Ed.2d 694 (1983) ("The fact that a person has been found, beyond a reasonable doubt, to have committed (cont'd)

Also, as the Supreme Court pointed out in Addington v. Texas, 441 U.S. 418, 425-426, 99 S. Ct. 1804, 1809, 60 L.Ed.2d 323 (1979):

> "This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, e.g., Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L.Ed.2d 435 (1972); Humphrey v. Cady, 405 U.S. 504, 92 S. Ct. 1048, 31 L.Ed.2d 394 (1972); In re Gault, 387 U.S. 1, 87 S. Ct. 1928, 18 L.Fd.2d 527 (1967); Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18, L.Ed.2d 326 (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual."

See also Breed v. Jones, 421 U.S. 519, 530, 95 S. Ct. 1779, 1786, 44 L.Ed.2d 346 (1975) ("'commitment is a deprivation of liberty.

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a criminal act certainly indicates dangerousness").

It is incarceration against one's will, whether it is called "criminal" or "civil,"'" quoting In re Gault, 387 U.S. 1, 50, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967)); State v. Ewell, 234 Md. 56, 198 A.2d 275 (1964) (time spent in mental institution should be credited against sentence).

Finally, in assessing the nature of a confinement like Anderson's to determine whether it may be deemed "punishment" for purposes of the ex post facto prohibition, it is pertinent to note that a criminal defendant committed to the custody of the Department of Health and Mental Hygiene, based upon the criminal case judgment that he was guilty of committing a criminal act but was insane at the time, is confined at the Clifton T. Perkins Hospital Center. This is a maximum security hospital; its purpose is to receive persons committed as a result of criminal prosecution or inmates from prisons

who need psychiatric hospitalization. See Ch. 814 of the Acts of 1959; Maryland Manual 1985-1986, p. 210.

No case has been called to our attention involving the precise ex post facto issue presented here.[8] On a related issue, several cases have taken the position that a change in the law imposing the burden of proof upon the defendant, with regard to the insanity issue at the criminal trial itself, cannot be applied where the criminal act occurred before the change in the law. See United States v. Williams, supra, 475 F.2d at 356-357; United States v. Prickett, 604 F.Supp. 407, 410 (S.D. Ohio 1985); United States v. Kowal, 596 F.Supp. 375, 378 (D.Conn. 1984); People v. Hollins, 136 Ill.App.3d 1, 90 Ill.

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[8] See, however, People v. Juarez, 184 Cal. App.2d 570, 229 Cal. Rptr. 145, 147-148 (1986), involving a different but perhaps analogous matter, and containing language arguably supporting the State's position in the instant case.

Dec. 770, 482 N.E.2d 1053, 1055 n. 1 (1985). See also State v. Coconino Cty. Superior Ct., 139 Ariz. 422, 678 P.2d 1386, 1390-1391 (1984) (agreeing with the result of the previously cited cases which were deemed "persuasive," but resting the decision on nonconstitutional state law grounds). Moreover, the federal Insanity Defense Reform Act of 1984, 18 U.S.C.A. §§ 4241-4247, inter alia, placed both the burden of proof on the insanity issue at the criminal trial and the burden of proof at a later administrative relief hearing (18 U.S.C.A. § 4243(d) upon the defendant, and "as a result of ex post facto considerations," the United States Department of Justice determined that "prosecutors should not seek to apply the new ... burden of proof provisions to conduct occurring prior to the date of enactment ...." U.S. Department of Justice, Handbook on the Comprehensive Crime Control Act of

1984 and Other Criminal Statutes Enacted by the 98th Congress, p. 65 (1984).

As previously pointed out, the sole reason advanced by the State and the Court of Special Appeals for the inapplicability of the ex post facto prohibition is that Anderson's confinement in the Clifton T. Perkins Hospital Center is not deemed "criminal" and is for the purposes of treatment and protection of society. Considering the nature of that confinement under Maryland law, and particularly the fact that it represents the disposition portion of an adverse judgment in a criminal case (Langworthy v. State, supra), we believe that the confinement does implicate the ex post facto prohibition. Because the change in the law concededly operates to Anderson's disadvantage, it may not be applied to him under the ex post facto clauses of the federal and state constitutions.

Consequently, the State shall have the burden of proof, by clear and convincing evidence, at Anderson's administrative release hearing.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AND TO REMAND THE CASE TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION RESPONDENTS TO PAY COSTS.

MURPHY, C. J., and RODOWSKY J., dissent.

RODOWSKY, Judge, dissenting.

I respectfully dissent because I am in substantial agreement with the analysis presented by Judge Wilner for the Court of Special Appeals in Anderson v. Department of Health & Mental Hygiene, 64 Md. App. 674, 498 A.2d 679 (1985).

The majority of this Court believes that Anderson's confinement implicates ex post facto prohibitions based on "the nature of that confinement under Maryland law, and particularly the fact that it represents the disposition portion of an adverse judgment in a criminal case ...." For the latter proposition, Langworthy v. State, 284 Md. 588, 399 A.2d 578 (1979) is cited. The majority relies on that portion of Langworthy which discussed whether an appeal would lie to review the verdict of guilty of the crime charged where the trier of fact had also found the accused to have been insane. The concern was whether there was a final judgment. In that contest this Court said:

> Despite the lack of a "sentence" in the context of punishment inflicted, the determination of the trial court as to the disposition of the defendant is as final a judgment following the conviction as if a sentence inflicting punishment had been imposed. The general rule that pronouncement of sentence or the suspension of its imposition is

> required to comprise an appealable judgment in a criminal cause does not apply because punishment is legislatively prohibited and supplanted by the statutory alternatives applicable upon the successful interposition of the defense of insanity. In circumstances such as here exist, the defendant may appeal from the judgment, composed of the verdict that he committed the criminal act charged and the disposition of him, as a final judgment in the contemplation of the statutory authority for direct appeal. [Id. at 597, 399 A.2d at 583.]

This is simply a nuts-and-bolts, technical discussion of a jurisdictional-procedural issue, and not a characterization of the confinement.

More appropriate, in my view, to the nature of Anderson's confinement is the characterization found in that portion of Langworthy in which this Court rejects the notion that the verdict of insane meant that Langworthy was attempting, in effect, to appeal from an acquittal. We said:

> In short, the clear legislative intent regarding the successful

> interposition of a plea of insanity is not that an accused is to be found not guilty of the criminal act it was proved he committed, but that he shall not be punished therefor. Rather than be punished, he may go free or, under prescribed circumstances, be provided treatment for his mental disorder. [Id. at 598, 399 A.2d at 584 (emphasis added).]

The difference under the present statute from that involved in Langworthy is that under new § 12-111(a) "after a verdict of not criminally responsible, the court immediately shall commit the defendant to the Department for institutional, inpatient care or treatment." An administrative hearing must be held within fifty days after that commitment for the purpose of making recommendations to the court concerning eligibility for release. See Md. Code (1982, 1986 Cum.Supp.), § 12-114(a) of the Health-General Article. Whether we deal with a commitment for evaluation under the old statute or a commitment for a maximum of

fifty days before an administrative hearing under the new statute, the disposition of the criminal case is "treatment for [the defendant's] mental disorder." Langworthy supra, 284 Md. at 598, 399 A.2d at 584. In my opinion, the prohibitions against ex post facto laws are not implicated.

MURPHY, C.J., has authorized me to say that he joins in this dissenting opinion.

APPENDIX B:

DECISION OF THE
COURT OF SPECIAL APPEALS OF MARYLAND
DATED OCTOBER 9, 1985

498 A.2d 679

Charles ANDERSON

v.

DEPARTMENT OF HEALTH AND MENTAL HYGIENE, et al.

No. 544, Sept. Term, 1985.

Court of Special Appeals of Maryland.

Oct. 9, 1985.

George E. Burns, Jr., Asst. Public Defender, Baltimore (Alan H. Murrell, Public Defender and George Lipman, Asst. Public Defender, Baltimore, on brief), for appellant.

Susan Sugar Nathan, Asst. Atty. Gen., Baltimore (Stephen H. Sachs, Atty. Gen., Baltimore, and C. Frederick Ryland, Special Counsel, Jessup, on brief), for appellees.

Argued before GILBERT, C.J., and WILNER, and ALPERT, JJ.

WILNER, Judge.

In 1984, the General Assembly rewrote the State insanity law. In doing so, it changed some of the procedures by which "insanity acquittees" (persons charged with crime but excused from criminal responsibility by reason of insanity) could seek and obtain release from judicially-ordered commitment to the Department of Health and Mental Hygiene (DHMH). The questions before us in this appeal are whether the Legislature intended those changes to apply to persons who, like appellant, were committed prior to the effective date of the new law, and, if so, whether such application would run afoul of Constitutional prohibitions against *ex post facto* laws.

At some point in "late 1980," appellant shot and killed his brother. On April 8, 1981, he was brought to trial in the Circuit Court for Baltimore City on a charge of first degree murder, to which he interposed a defense of insanity.

Under the law then in effect, once such a plea was filed and sufficient evidence was admitted to raise a doubt as to the defendant's sanity, it was incumbent on the State to prove beyond a reasonable doubt that the defendant was sane, *i.e.*, that he did not lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *See* former Md.Code

Ann. art. 59, § 25 (1979 Repl.Vol.);[1] *Bradford v. State*, 234 Md. 505, 200 A.2d 150 (1964); *Bremer v. State*, 18 Md.App. 291, 307 A.2d 503, *cert. denied* 269 Md. 755 (1973), *cert. denied* 415 U.S. 930, 94 S.Ct. 1440, 39 L.Ed.2d 488 (1974). The requisite doubt was raised by appellant and the State apparently failed to meet its burden, for appellant was found not guilty by reason of insanity.

As an "insanity acquittee," appellant was then subject to the provisions of §§ 27–27C, 14, and 15 of art. 59. The first three of those sections, §§ 27–27B, dealt with the immediate handling of an "insanity acquittee"—whether he should be confined for treatment, released subject to certain constraining conditions, or released outright and unconditionally. The last three (§§ 27C, 14, and 15) assumed an initial confinement and dealt with how such a confined person could subsequently obtain release.

Section 27 provided that, upon an adjudication of insanity, the court would commit the defendant to DHMH for examination and evaluation. On completion of the evaluation, an evidentiary hearing would be held before a DHMH hearing officer. The purpose of the hearing, according to § 27A(a), was to consider the evaluation and other relevant information "to enable the hearing officer to make recommendations to the court" as to whether the defendant met the criteria for confinement—*i.e.*, whether he had a mental disorder and whether, by reason of that disorder, he would be a danger to himself or to others if released either outright or conditionally. At that hearing, the defendant had the right to be present, to be represented by counsel, to offer evidence, and to cross-examine adverse witnesses.

Upon completion of the hearing, the hearing officer would prepare and send to the court a report summarizing the evidence adduced at the hearing and containing the hearing officer's recommendations "as to each issue to be decided

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1. All references in this Opinion to sections of art. 59 are to the sections as they appeared in the 1979 Repl.Vol. and 1980 Supp.

by the court." Because the hearing officer was not called upon to make specific findings, but only to summarize the evidence and make recommendations, there was no provision in § 27A for any burden or standard of proof at the administrative proceeding.

Section 27B permitted the State's Attorney and the defendant to file exceptions to the hearing officer's report. If such exceptions were timely filed, or if the court on its own initiative decided not to follow the hearing officer's recommendations, it was to conduct a hearing on the record made before the hearing officer and enter an appropriate order. Under § 27B(e) and (f), it is clear that the actual findings with respect to whether the defendant met the criteria for confinement were those of the court.[2] In that regard, § 27B(i) provided that "[a]ll findings by the court under subsections (e) and (f) of this section shall be upon clear and convincing evidence."

In accordance with those provisions, appellant was evaluated by DHMH; he had a hearing before a DHMH hearing officer; the hearing officer made a report to the court summarizing the evidence and recommending confinement for institutional inpatient treatment; and the court, employing the clear and convincing standard, concurred in the

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2. Section 27B(e) provided:

"*If the court finds* that the person has a mental disorder, and by reason of that mental disorder would be a danger to himself, or the person or property of others if not confined in an institution for in-patient care or treatment, it shall enter an order committing the person to the Department of Health and Mental Hygiene for institutional in-patient care or treatment." (Emphasis added.)

Subsection (f) contained a similar provision with respect to conditional release.

See also 3/14/79 Memorandum from Chairman of the Special Legislative Committee on Mental Health Laws to Senate Judicial Proceedings Committee with respect to 1979 Md.Laws, Ch. 701 (then SB 870) by which §§ 27–27C were enacted, noting that under § 27B, in contrast to the situation with respect to persons civilly committed, "the hearing officer in this procedure will not control the disposition of the case, but will advise the court by way of recommendation only."

hearing officer's recommendation and ordered appellant's confinement.

Appellant's rights thereafter, as noted, were governed by §§ 14, 15, and 27C of art. 59.

Section 14 afforded appellant an opportunity to seek release through *habeas corpus*. Subsection (a) provided that "[a]t any time, any person admitted to any facility [3] ... may apply to any appropriate court for a writ of habeas corpus. Such proceeding shall be available to determine the cause and the legality of his admission and continued detention."

Section 15, captioned "Judicial Release," provided for a special "sanity hearing." Subsection (a) permitted "any patient ... at any time" to file a petition in the equity court "for the purpose of securing his release." The issues to be determined in the proceeding were essentially the same as under § 27A dealing with initial commitment—"(1) Does the patient have any mental disorder; and (2) Is the disorder of such a nature that for the protection of himself or others, the patient needs inpatient medical care or treatment." § 15(d). The petitioner could elect to have those issues tried before a jury, "and thereafter, such trial shall proceed as in a civil action at law." § 15(c). If the trier of fact—court or jury—answered either question in the negative, "the petitioner shall be released from the facility...."

Under either of these proceedings, as the petitioner, the "insanity acquittee" necessarily bore the burden of proof; it was incumbent upon him to establish his eligibility for release by proving, by a preponderance of evidence, that he either did not have a mental disorder or, if he did, that it did not render him dangerous to himself or to others. *See Czaplinski v. Warden*, 196 Md. 654, 663–64, 75 A.2d 766 (1950), and *Graham v. State of Maryland*, 454 F.Supp. 643, 650 (D.Md.1978) with respect to a petitioner's burden in a

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3. The term "facility" was defined in § 3(e) of art. 59 as including any hospital or other institution "which purports to or does provide treatment or other services for persons having any mental disorder."

habeas corpus proceeding and *Daniels v. Superintendent*, 34 Md.App. 173, 366 A.2d 1064 (1976), and *Dorsey v. Solomon*, 435 F.Supp. 725 (D.Md.1977), *aff'd in part, remanded in part*, 604 F.2d 271 (4th Cir.1979) with respect to the petitioner's burden in a § 15 proceeding.

Section 27C, first enacted only two years before appellant's commitment, provided, as an alternative to the judicial proceedings under §§ 14 and 15, the same kind of hybrid, or bi-level, proceeding afforded under §§ 27A and 27B. After six months of post-commitment confinement, an "insanity acquittee" could apply for release by "notifying the court and the State's attorney in writing of his request for an administrative hearing and judicial determination." § 27C(c)(i). Upon receiving such a notice, said § 27C(d), "the court shall notify [DHMH] to evaluate the person in accordance with the issues set out in § 27(c) within 20 days of the date of the notice. Upon completion of that evaluation, the persons shall have the rights enumerated in §§ 27A and 27B." Among other things, of course, that cross-reference to §§ 27A and 27B meant that the evidentiary hearing was before a DHMH hearing officer, that the hearing officer made no findings as to the defendant's eligibility for release but only a recommendation, that the court made the critical findings, and that a decision to retain the defendant in confinement had to be based upon clear and convincing evidence.[4]

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4. When §§ 27–27C were first enacted in 1979, the standard of proof required in a § 27B or § 27C hearing was preponderance of evidence. *See* 1979 Md.Laws, ch. 701. That followed a conclusion by the U.S. District Court in *Dorsey v. Solomon, supra*, 435 F.Supp. 725, that no higher standard was constitutionally required.

Within a week or two after passage of the 1979 law (SB 870), however, the United States Supreme Court decided *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), in which it held that, in a *civil* commitment proceeding, the preponderance of the evidence standard was constitutionally inadequate; the State was obliged to justify involuntary civil confinement by clear and convincing evidence. Early interpretations of *Addington* suggested that the reasoning employed by the Supreme Court with respect to civil commitment might apply equally to the commitment of defendants ex-

In September, 1982, appellant unsuccessfully sought relief through a § 27C bi-level proceeding. Although the record in that proceeding is not now before us, it is implicit from appellant's lack of success that the court again determined upon clear and convincing evidence that, by reason of mental disorder, he would, if released from confinement, continue to be a danger to himself or to others.

Much of this procedure changed in 1984, with the enactment of 1984 Md.Laws, ch. 501. In the aftermath of the celebrated trial of John Hinckley, the Governor created a Task Force to Review the Defense of Insanity. Ch. 501 is largely the product of that Task Force.

Although the 1984 Act completely rewrote title 12 of the Health-General article (which, by virtue of Code Revision had supplanted former art. 59 in 1982), a great deal of the existing law was unchanged. The insanity defense was retained, as were the substantive tests or standards for competence to stand trial, criminal responsibility, and eligibility for release following an adjudication of insanity.

The major changes made by the new law seemed to flow from the intervening pronouncements of the U.S. Supreme Court in *Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983). There, a closely divided Court

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cused from criminal responsibility by reason of insanity. *See* Opinion of the Attorney General on SB 870 (5/25/79); Opinion of the U.S. Court of Appeals for the Fourth Circuit in *Dorsey v. Solomon*, 604 F.2d 271 (4th Cir.1979); this Court's opinion in *Williams v. Superintendent*, 43 Md.App. 588, 406 A.2d 1302, *cert. granted* 286 Md. 754 (1979), *judgment vacated in light of Legislative enactment* 288 Md. 523 (1980); and *Commitment Following An Insanity Acquittal*, 94 Harv.L.R. 605, 615–17 (1981). Accordingly, at its next session, by 1980 Md.Laws, ch. 292, the Legislature amended § 27B(i) to require the court's findings under § 27B(e) and (f) to be upon clear and convincing evidence. By virtue of the cross-reference to those sections in § 27C(d), the same increased standard was automatically made applicable to the post-commitment administrative proceeding under § 27C. The 1980 amendment did not affect either the *habeas corpus* proceeding under § 14 or the "judicial release" proceeding under § 15, however. Thus, if a committed defendant chose either of those remedies, he still had the burden of establishing his eligibility for release by a preponderance of evidence.

(5–4) found no constitutional deficiency in a District of Columbia law that (1) placed the burden on the defendant in the criminal proceeding to establish his insanity by a preponderance of the evidence, (2) provided for automatic commitment of the defendant to a mental hospital upon an adjudication of insanity until he could establish his entitlement to release, and (3) afforded him an opportunity within 50 days of commitment and at six-month intervals thereafter to establish in a judicial proceeding his entitlement to release, by a preponderance of the evidence.

Though reaffirming the determination in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), that a "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," (*Jones, supra*, 463 U.S. at 361, 103 S.Ct. at 3048), the Court concluded that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society." *Id.* at 366, 103 S.Ct. at 3050. Turning then to the question of who ought to bear the burden on the issue of commitment and by what standard, the Court expressly rejected an extension of the *Addington* holding to the commitment of "insanity acquittees," concluding that there were "important differences between the class of insanity acquittees that justify differing standards of proof." *Id.* at 367, 103 S.Ct. at 3051. The fact that the insanity acquittee "*himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness ... is good reason for diminished concern as to the risk of error." *Id.* (emphasis in original). Thus, "[t]he preponderance of the evidence standard comports with due process for commitment of insanity acquittees." *Id.* at 368, 103 S.Ct. at 3051 (footnote omitted).

In accordance with these holdings and upon the Task Force's recommendations, the Legislature did away with the existing commitment and release procedures and adopted in their stead much of the District of Columbia approach sustained in *Jones*. Under prior caselaw, as not-

ed, once the defendant, at his criminal trial, offered sufficient evidence of insanity to rebut the initial presumption of sanity, the State was required to prove sanity (*i.e.*, criminal responsibility) beyond a reasonable doubt. New § 12–109(b) changed that; it requires the defendant to prove non-responsibility by a preponderance of evidence.

A similar shift in burden of proof was made with respect to both the initial commitment proceeding and a subsequent bi-level proceeding for release. Under new § 12–111, a defendant found not criminally responsible is automatically committed to DHMH for institutional inpatient treatment; under § 12–113, he is eligible for release only if he would not be a danger to himself or to the person or property of others, and "[t]o be released, a committed individual has the burden to establish by a preponderance of the evidence eligibility for discharge or eligibility for conditional release."

Section 12–114 requires that, within 50 days after initial commitment, a hearing must be held before a DHMH hearing officer, "to consider any relevant information that will enable the hearing officer to make recommendations to the court as to whether the committed individual is eligible for release under § 12–113...." At the conclusion of the hearing, the hearing officer prepares and sends to the court a report containing (1) a summary of the evidence presented at the hearing, (2) "[r]ecommendations of the hearing officer as to whether the individual proved, by a preponderance of the evidence, eligibility for conditional release, or eligibility for discharge," and (3) if the hearing officer determines that the defendant "proved eligibility for conditional release," the recommended conditions of the release. *See* § 12–115.

As in the prior law, the court makes the actual decision. It may on its own initiative and must upon timely filed exceptions hold a hearing, but, with or without a further hearing, it must ultimately determine "whether the evidence indicates that the committed individual proved by a

preponderance of the evidence eligibility for release, with or without conditions, in accordance with § 12–113...." *See* § 12–117(a).

Subsequent release following this initial determination is governed by § 12–118. At yearly intervals,[5] the defendant may seek release through either a bi-level proceeding similar to that conducted pursuant to §§ 12–114–12–117 or a direct judicial proceeding, where the issue of his eligibility for outright or conditional release can be tried before the judge or a jury. Whichever route is chosen, the judicial trier of fact ultimately must determine "whether the committed individual has proved eligibility for release by a preponderance of the evidence...." *See* § 12–118(b)(2) and (c)(4).

Ch. 501 took effect July 1, 1984. In November, 1984, appellant requested another hearing before a DHMH hearing officer but urged that the proceeding—at least as to the standard and burden of proof—be governed by the former law. The State insisted, however, and on November 21, 1984, persuaded the Circuit Court for Baltimore City to direct, that the proceeding be conducted under the new law.

An evidentiary hearing was held before a hearing officer on March 21, 1985, at which only two people—appellant and Dr. Brian Crowley, a psychiatrist on the staff of C.T. Perkins State Hospital—testified. Appellant acknowledged that he currently had "a mental health problem" and that he was "sick." If released, he said he would go home to live with his mother, get a job, and accept outpatient treatment. Dr. Crowley, expressing the unanimous view of the C.T. Perkins staff conference, recommended retention. He opined that appellant continued to suffer from a mental disorder—schizophrenia, paranoid type—and that, if re-

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5. Section 12–118(a)(2) permits an earlier application if the application is accompanied by an affidavit of a physician or licensed psychologist "that states an improvement in the mental condition of the committed individual since the last hearing." Except for the requirement that the affidavit be of a physician or psychologist, that provision was also in the earlier law. *See* former art. 59, § 27C(a).

leased, he would present a danger to himself or others. Dr. Crowley noted that appellant had "a long history of serious psychosis with paranoid features, with delusional symptoms and feelings of being persecuted." He stated further that appellant "still is very guarded and suspicious, has really no understanding of his mental disorder. And hence, I don't think he can be reasonably expected to be able to cooperate in an adequate treatment plan, if he were out on the street."

On March 29, the DHMH hearing officer filed a report in which he found that appellant "has failed to prove, by a preponderance of the evidence, eligibility for conditional release, or eligibility for discharge." He therefore recommended that appellant be retained at C.T. Perkins for inpatient care and treatment. Appellant excepted to the report, but the court, on June 4, 1985, concurred in the hearing officer's findings and ordered a continuation of appellant's confinement. We granted appellant's timely application for leave to appeal (*see* Health-Gen. art., § 12-118(d)(2)) to consider whether,

> "I. The circuit court's order requiring appellant to establish his eligibility for release by a preponderance of the evidence subjected appellant to an ex post facto law in violation of the Maryland and U.S. Constitutions.
>
> II. The court below erroneously construed Section 4 of Ch. [501] in giving retrospective effect to the burden of proof provision codified as § 12-113(d)."

We shall consider these issues in inverse order; finding no error, however, we shall affirm.

(1) *Statutory Construction*

Section 5 of ch. 501 provides that the Act "shall take effect on July 1, 1984." Section 4 states:

> "That the provisions of this Act shall be applicable *to any case filed* on or after the effective date of this Act *and to any individual found not criminally responsible by reason of insanity* or determined to be incompetent to stand trial *who is under commitment to the Depart-*

ment of Health and Mental Hygiene on or after the effective date of this Act; except that the *initial* commitment of an individual found to have been insane at the time of the commission of a criminal act under the law in effect before the effective date of this Act shall be governed by former §§ 12–110 through and including 12–113 of the Health—General Article as those sections applied on June 30, 1984." (Emphasis added.)

[1, 2] In the Circuit Court, appellant argued that because his "case" had been "filed" before July, 1984, and because the term "not criminally responsible by reason of insanity" originated in the Act itself and had no significance before July, 1984, § 4, by its very terms, precluded application of the Act to him. Except for a passing reference in his brief to memoranda of law that he filed in the Circuit Court, however, appellant does not pursue that argument before us, and we shall therefore not consider it.[6] His argument here is based on the "legal presumption" that "absent a clear expression of contrary legislative intent," an Act is intended to have only prospective effect; section 4, he says, does not clearly articulate such a contrary intent. We disagree.

Ch. 501, as noted, rewrote a good bit of the State insanity law and affects the entire spectrum of proceedings from the criminal trial through post-adjudication commitment and ultimate release from confinement. In using the language it did, the Legislature clearly manifested an intent to have those provisions affecting the trial apply only to cases filed on or after July 1, 1984, to have those provisions affecting *initial* commitment apply only to commitments made on or after that date, but to have those provisions governing release from confinement apply to all persons who were in

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6. An argument not presented in the appellant's brief will not be considered on appeal. *Jacober v. High Hill Realty, Inc.*, 22 Md.App. 115, 321 A.2d 838, *cert. denied* 272 Md. 743 (1974); a mere reference to a trial memorandum does not suffice to present the argument. *Rosenberg v. Rosenberg*, 64 Md.App. 487, 523, n. 10, 497 A.2d 485 (1985).

fact "under commitment" on that day. There is no other sensible way to read § 4.

(2) *Ex Post Facto Considerations*

The enactment of *ex post facto* legislation is prohibited by both the Federal and the Maryland Constitutions. Art. 1, § 10, cl. 1 of the Federal Constitution states unequivocally that "No State shall ... pass any ... ex post facto Law...." Art. 17 of the Md.Decl. of Rts., which antedated its Federal counterpart by 11 years, is a bit more verbose: "That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made...."[7]

[3] Notwithstanding the difference in language, these provisions, as interpreted respectively by the U.S. Supreme Court and the Maryland Court of Appeals, are essentially the same in intent, scope, and effect. The Maryland provision "parallels the federal clause ... and the Supreme Court's interpretation of the federal *ex post facto* clause is persuasive authority" in construing the State counterpart. *Tichnell v. State*, 287 Md. 695, 736, 415 A.2d 830 (1980).

The seminal case interpreting the Federal provision was *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). At issue there was whether an Act of the Connecticut legislature that set aside a decree of a State probate court and granted a new hearing in that court constituted a prohibited *ex post facto* law. The Connecticut court had rejected the complaint of the parties aggrieved by the legislative act; the Supreme Court affirmed.

Three of the four Justices who sat in the case made clear in their separate Opinions that the prohibition did not ex-

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7. Art. 17 goes on to prohibit "any retrospective oath or restriction" from being "imposed" or "required." Appellant does not argue that the challenged part of ch. 501 represents a "retrospective oath or restriction," and so we shall not give further consideration to that aspect of Art. 17.

tend to all retrospective legislation, but only that of a penal nature. Justice Paterson opined that "*ex post facto* laws have an appropriate signification; they extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and, perhaps, enhancement of crimes, pains and penalties." 3 Dall. at 397. Justice Chase, in a more frequently quoted passage, put it this way (at 390):

> "I will state what laws I consider *ex post facto* laws, within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

In the nearly 200 years since *Calder v. Bull*, the Supreme Court has never departed from that basic analysis and circumscription of the prohibition. As late as 1981, in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the Court regarded an *ex post facto* analysis as "concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred...." *Id.*, 30, n. 13, 101 S.Ct. at 965, n. 13. *See also Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977), quoting from *Beazell v. Ohio*, 269 U.S. 167, 169–70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925). The same type of analysis and circumscription has found expression in the Maryland cases construing Art. 17. *See Spielman v. State*, 298 Md. 602, 608, 471 A.2d 730 (1984); *Village Books, Inc. v. State*, 22 Md.App. 274, 287, 323 A.2d 698 *cert. denied* 273 Md. 723 (1974); *cf. Beard v. State*, 74 Md. 130, 132, 21 A. 700 (1891); *Elliott v. Elliott*, 38 Md. 357, 360 (1873); *An-*

derson v. Baker, 23 Md. 531, 566 (Bartol, J., dissenting), 581, 582 (Cochran, J., concurring), and 605 (Weisel, J., concurring) (1865); *Braverman v. Bar Ass'n of Balto.*, 209 Md. 328, 348, 121 A.2d 473, *cert. denied* 352 U.S. 830, 77 S.Ct. 44, 1 L.Ed.2d 51 (1956).

The threshold question, then—and the dispositive one, in our view—is whether the challenged act, shifting the burden of proof in a bi-level post-commitment release proceeding, "assigns more disadvantageous *criminal or penal consequences*" to appellant's "criminal" act than were assigned to it when the act was committed. *Weaver v. Graham, supra*, 450 U.S. 24, 30, n. 13, 101 S.Ct. 960, 965, n. 13, 67 L.Ed.2d 17 (emphasis added).

The question of whether, and when, a sanction or disability imposed by statute is penal in nature was addressed in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). At issue there was whether Congress could constitutionally deprive a native-born American of his United States citizenship, and thereby render him stateless, because of his conviction by court-martial of wartime desertion. The Act—§ 401(g) of the Nationality Act of 1940—was challenged as being both *ultra vires* and as imposing cruel and unusual punishment; it was in the latter context that the Court considered whether the deprivation of citizenship was penal in nature. Speaking for himself and Justices Black, Douglas, and Whittaker, Chief Justice Warren borrowed from the *ex post facto* cases in enunciating the standards for deciding that issue. At 95–96, 78 S.Ct. at 595–596:

> "This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder v. Bull*, 3 Dall. 386 [1 L.Ed. 648 (1798)]. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has general-

ly based its determination upon the purpose of the statute. *If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.* The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature." [8] (Footnotes omitted; emphasis added.)

Some further expression of these views was given five years later in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), which involved another section of the Nationality Act of 1940, purporting to strip Americans of their citizenship automatically for leaving the country in time of war in order to avoid military service. Again, the question was raised of whether the sanction—expatriation—was penal in nature. Justice Goldberg, writing for the Court, noted in *dicta* that, absent "conclusive evidence of congressional intent as to the penal nature of a statute," the following factors, which he acknowledged "often point in differing directions," were relevant to the inquiry: [9]

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8. The ultimate conclusion reached by the Chief Justice on this analysis was that the Act *was* penal in nature and that it *did* constitute cruel and unusual punishment. Justice Brennan concurred in the judgment on the independent ground that the Act was *ultra vires*. Justices Frankfurter, Burton, Clark, and Harlan dissented on the grounds that the Act was not *ultra vires*, that it was not penal in nature but rather was consistent with a "'non-penal' purpose to regulate the military forces," and that, even if penal in nature, it did not impose cruel or unusual punishment. *See also Perez v. Brownell*, 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958).

9. These observations were *dicta* because the Court went on to hold that "objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." *Id.* at 169, 83 S.Ct. at 568.

"Whether the sanction involves an affirmative disability or restraint, whether it has, historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned...."

Id. at 168–69, 83 S.Ct. at 567–68 (footnotes omitted).

Justice Stewart, joined by Justice White, in dissent put it more succinctly: "The question of whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective." *Id.* at 208, 83 S.Ct. at 588.

It would be a most unproductive enterprise for us to attempt to pick and choose among these various expressions in order to discern any single authoritative articulation of the proper standard. In essence, they express the same thought: What was the paramount legislative intent; what is its paramount effect? If retributive or deterrent, it is most likely punitive or penal in nature; if it is to accomplish "some other legitimate governmental purpose," it is likely not punitive or penal, despite the incidental imposition of some disability.

Appellant's analysis is fairly straightforward. Under *Addington v. Texas*, he says, the State must bear the burden of justifying a civil commitment by clear and convincing evidence. *Jones v. United States* permits a different rule for "insanity acquittees," he continues, only because of the judgment rendered in the criminal proceeding. *Ergo*, the commitment of an "insanity acquittee" arising from a criminal proceeding is necessarily criminal or punitive in nature, and shifting the burden and standard from

that required by *Addington* to that permitted by *Jones* is also necessarily punitive in nature.[10]

Although we do not concur in the ultimate validity of this proffered syllogism, and indeed note that *Jones* itself refutes the argument, appellant is at least correct in analyzing the challenged provision in context. Standards or bur-

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10. At oral argument, appellant posited an additional theory in support of his claim, one that does not appear to have been raised below or, indeed, in his brief. He noted that, under Md.Code Ann. art. 27, § 139, elopement from confinement by an "insanity acquittee" constitutes criminal escape—a felony—whereas elopement by a person civilly committed does not constitute a crime. This, he says, is further evidence of the punitive nature of his commitment.

Punishment for elopement from confinement does not necessarily make the confinement itself penal or punitive in nature, any more than punishment for desertion makes service in the armed forces penal or punitive. Since 1969, elopement by a person *civilly* committed to a drug addiction rehabilitation center under the Comprehensive Drug Abuse Control Act has been declared criminal under § 139. *See* former Md.Code Ann. art. 43B, § 17, which was transferred to § 139 in 1982 as part of the enactment of the Health-General article (1982 Md.Laws, ch. 21). Inclusion within § 139 of elopement by an "insanity acquittee" was effected in 1984 by ch. 501, which, we note, also expressly added to § 139 elopement by persons committed to DHMH following a finding of incompetence to stand trial. *Compare Slagle v. State,* 243 Md. 435, 221 A.2d 641 (1966), holding that elopement by a person transferred under the former "insanity" law to C.T. Perkins State Hospital for evaluation as to his competence to stand trial constituted criminal escape under § 139.

Persons civilly committed to DHMH can be released administratively by DHMH; indeed, absent the periodic execution of new certificates of the type required for an initial involuntary admission, such persons *must* be released administratively. *See* Md.Code Ann., Health-Gen. art., § 10–806. "Insanity acquittees," on the other hand, cannot be released, either conditionally or outright, administratively; only the court can order their release. Unlike persons civilly committed, whose "dangerousness" is often a matter merely of prediction, "insanity acquittees" have demonstrated a level of dangerousness by their past criminal behavior; indeed, it is that past demonstration, coupled with a current diagnosis, that particularly justifies an enforced treatment. *Jones v. United States, supra.* Elopement from that enforced treatment therefore carries with it more than the ordinary problems that may arise from an elopement by a civilly committed patient; it serves to frustrate the court's legislatively authorized control over the individual and provides a more significant potential threat to public safety. Those are the considerations that justify reinforcing the therapeutic commitment by punishing elopement.

dens of proof, of themselves, are neither penal nor non-penal. They take their character as one or the other only from the nature of the proceeding to which they relate. The real issue, then, is whether the confinement of "insanity acquittees" under Maryland law and against the standards enunciated by the Supreme Court, is penal or punitive in nature.

In *Langworthy v. State*, 284 Md. 588, 399 A.2d 578 (1979), a unanimous Court of Appeals made clear its view that the purpose and effect of such confinement was *not* punitive. It said, at 598, 399 A.2d 578:

> "In short, the clear legislative intent regarding the successful interposition of a plea of insanity is not that an accused is to be found not guilty of the criminal act it was proved he committed, *but that he shall not be punished therefor. Rather than be punished, he may go free or, under prescribed circumstances, be provided treatment for his mental disorder.*" (Emphasis added.)

See also Pouncey v. State, 297 Md. 264, 267–68, 465 A.2d 475 (1983); *Johnson v. State*, 292 Md. 405, 448, 439 A.2d 542 (Eldridge, J., dissenting), and 474 (Cole, J., dissenting) (1982).

The Supreme Court expressed the same view in *Jones v. United States, supra*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694. At 368, 103 S.Ct. at 3051, it observed: "The purpose of commitment following an insanity acquittal, like that of civil commitment, *is to treat the individual's mental illness* and protect *him* and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." (Emphasis added.) *See also O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

These expressions are in full keeping with the plain words of the Legislature. In former art. 59, §§ 27, 27B, and 27C, the General Assembly carefully and consistently made clear that post-adjudication confinement was solely for "in-patient care or treatment," and that same limitation

appears in the current law. *See* Health-Gen. art., §§ 12–111(a), 12–113(b). Indeed, the law requires that, once the individual's condition has improved to the point that institutional confinement is no longer necessary, he must be released from that confinement, either with or without condition. *See* former art. 59, § 27B(f), (h); current Health-Gen. art., § 12–113(b), (c).

[4] Thus, while, as appellant contends, institutional confinement is certainly a consequence of his criminal act (*see Pouncey v. State, supra,* 297 Md. at 270, 465 A.2d 475), it is not a penal or punitive consequence. *Cf. Monroe v. Director,* 220 Md. 650, 653, 187 A.2d 873 (1963). Accordingly, the shifting of the burden and standard of proof in the bi-level release proceeding does not constitute a prohibited *ex post facto* law under either the Federal or the Maryland Constitution.[11]

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.

APPENDIX C:

DECISION OF THE CIRCUIT COURT FOR BALTIMORE CITY DATED MARCH 7, 1985

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
V.	*	FOR
	*	BALTIMORE CITY
CHARLES ANDERSON	*	IND: 18031909

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MEMORANDUM OPINION AND ORDER

Effective July 1, 1984, Title 12 of the Health-General Article of the Maryland Code "Incompetency and Insanity in Criminal Cases" (Old Law) was repealed and replaced by new Title 12 "Incompetency and Criminal Responsibility in Criminal Cases" (New Law). The General Assembly adopted the New Law based on recommendations of the Governor's Task Force to Review the Defense of Insanity (Task Force). The name of the defense was changed to "not criminally responsible by reason of insanity." See Task Force Comment Md. Health Gen. Code Ann., 12-108, 109 (1984).

Under the Old Law, the burden of persuasion to prove sanity at the criminal trial had been on the State to prove beyond a reasonable doubt. Bradford v. State, 234 Md. 503 (1964). Under the New Law, the defendant must establish the defense of not criminally responsible by reason of insanity by a preponderence of the evidence. New Law, Sec. 2-109(b). Under the Old Law, the State had the burden (after the criminal defendant was successful in raising the insanity defense) to seek commitment of the defendant by clear and convincing evidence, Md. Ann. Code, Art. 50, Sec. 27B (1980), and if committed, the State still had the later burden to prove by clear and convincing evidence that the Insanity Committee met the substantive criteria for retention when he filed later petitions for release.[1] Under the New Law,

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[1] Mr. Anderson asserts that he no longer suffers from a mental disorder, is not a danger to himself or the persons or property (cont'd)

individuals found insane are now automatically committed and the Insanity Committee has the burden to prove release eligibility by a preponderance of the evidence.

The New Law provides in pertinent part,

> [T]he provisions of this Act shall be applicable to any case filed on or after the effective date of this Act (July 1, 1984) and to any individual found not criminally responsible by reason of insanity ... who is under commitment to the Department of Health and Mental Hygiene on or after the effective date of this Act (July 1, 1984) ....

On April 8, 1981, Mr. Anderson was found insane of first degree murder. The offense occurred in late 1980. On April 8, 1981 this Court committed him to the Department of Health and Mental Hygiene (Department) for examination and evaluation to determine whether he met the standards for inpatient treatment. After an administrative hearing

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of others if not confined to an institution

and in line with the recommendations of a departmental hearing officer this Court committed him for inpatient care on April 21, 1981.

He has remained confined to Clifton T. Perkins Hospital Center, a facility of the Department. He has unsuccessfully sought his release by electing an administrative hearing and judicial determination. On September 7, 1982, this Court ordered his continued commitment. Since September 7, 1982, Mr. Anderson has filed no applications for release except for the instant application.

He now seeks his release and requests that this Court assign the burden of persuasion to the State to prove by clear and convincing evidence that he meets the standards for institutional inpatient care and treatment. Further, he requests that this Court order that the provisions of the Old Law govern his application for release.

The State argues that the New Law applies, that is, that the Insanity Committee, and not the State, has the burden of proving release eligibility by a preponderance of the evidence.

I.

"PLAIN MEANING"

Mr. Anderson argues that before the New Law there was no such verdict as "not criminally responsible by reason of insanity." It was only "guilty and insane"[2] or "not guilty by reason of insanity" or "insane." The New Law created the language "not criminally responsible by reason of insanity" because the Task Force felt that such language was a "more accurate statement of the defendant's status in criminal law" and less stigmatizing as concerns the mentally ill who had not committed crimes.

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for in-patient treatment.

[2] Langworthy v. State, 284 Md. 583 (1979),

See the Report of the Task Force at 23 (Explanation).[3]

The Insanity Committee argues that since the New Law specifically gears applicability to an individual found "not criminally responsible by reason of insanity" and since this verdict did not exist prior to the New Law, the plain meaning rule precludes the application of the New Law.

The State, however, asserts that "not criminally responsible by reason of insanity" and "insanity" are interchangeable terms. It points to cases such as Sherrill v. State, 14 Md. App. 146, 147 (1972), Young v. State, 14 Md. App. 538, 540-47 (1972) and Langworthy v. State, supra at 593, fn. 7 (1979), which equate "test for criminal responsibility," "defense of insanity" and "criminal responsibility."

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cert. denied, 450 U.S. 960 (1981).

[3] The Report of the Task Force is attached

It seems to me that the matter of statutory labelling does not create any roadblock to the application of the New Law. It is a matter of form and of definition. No substantive change was intended. If the legislature had said "not criminally responsible" without any other qualifying language, the Insanity Committee's argument would be stronger. But when it tied in "not criminally responsible" with "by reason of insanity" it seems clear that the basis of the verdict under both the Old Law and the New Law is "insanity."

II

AMBIGUITY AND BURDEN SHIFTING

Mr. Anderson next argues that the language "any case filed" is ambiguous.[4] -- He contends such ambiguity cannot be the clear expression of restrospectivity needed

---

hereto and made a part hereof as "Exhibit 1."

[4] Does it mean, he argues, the 1980 charging

to rebut the prospective application of the New Law. He asserts that the New Law's burden of proof as to release eligibility does not apply to him. Hence he contends that the Old Law's burden of proof applies. He asserts that any shift from the Old Law's burden of clear and convincing evidence on the part of the State to the New Law's preponderance burden on his part is a substantial and not a procedural, change. He grounds his argument on lack of fair warning. He says that his decision to plead insane could well have been made because he was entitled to feel that if his insanity defense succeeded, the State would have to prove (by clear and convincing evidence) his continued need for inpatient treatment.

The State responds by saying that the matter of ambiguity is irrelevant because Mr. Anderson was "under commitment to the Department" on July 1, 1984 and hence the New

Law applies to his case.

Moreover the State calls the Insanity Committee's burden of proof argument one that seeks to make his insanity pleading decision a "vested right" in the Old Law's burden of proof. It rejects such vested right. It points to the achievement of administrative uniformity by making administrative hearings the same as judicial release hearings, as concerns burden and standard of proof.[5] It states that the New Law is remedial, not designed to impair vested rights, and points to analogous situations where later changes in remedial treatment committment statutes have been upheld [see, e.g. defective delinquency statutes, Monroe v. Dir., 230 Md.

---

document or the instant application for release filed after July 1, 1984?

[5] Under the Old Law, an Insanity Committee could seek either an administrative proceeding with judicial review or judicial release in a civil proceeding in an equity court, either with or without a jury. If he chose judicial review, he had the burden of

650, 652-53 (1963)]. It argues that the change is procedural and not substantive. It stresses the "positive benefits" of the changes, in that the proof will reflect the patient's positive achievement in controlling mental illness and not require that the State prove negative things about the Insanity Committee.

The Insanity Committee position is persuasive. He may well have asserted the insanity defense hoping for the best of both worlds, i.e., a verdict of "insane" thus escaping criminal responsibility, while at the same time taking advantage of the heavy clear and convincing burden that he expected that the State would have to shoulder. The change in the New Law is adverse to him.

The question is whether the positive benefits of the New Law outweigh the disadvantage to Insanity Committees such as Mr. Anderson. It must be remembered that the

New Law did not change the standard. It was, and is:

> Whether by reason of mental disease, the Insanity Committee is a danger to himself, to (the person's) own safety, or a menace to the safety or the person or property of other people if at large.
>
> Salinger v. Supt., 206 Md. 623, 632 (1955) Old Law, Sec. 12-113(b)(ii) (1982) New Law, Section 12-113(b) (1984).

If the Insanity Committee is correct, the State will have to bear the administrative burden of bifurcating release procedures for different classes of Insanity Committees, contingent only upon the date of original commitment. The date of original commitment has been termed "insignificant," Sherrill v. State, 14 Md. App. 146, 155 (1972), and while Sherrill is not factually analogous,[6] it does apply a later mental responsibility law to

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proving fitness for release by a preponderence of the evidence.

[6] It involved one tried after a new law had changed the test of mental responsibility for

cases tried after the effective date of the New Law, even if the criminal act happened before the effective date of the New Law.

The Sherrill Court frowned upon the idea of "two separate tests for criminal responsibility in effect at the same time." Sherrill at 155. The State uses the same argument in this case. Sherrill noted that the insanity defense becomes truly meaningful when the case is tried and not when the crime occurred, and that is why it concluded that the legislature could not have meant to have two tests (one to deal with mental condition at the time of the commission of the criminal act and one to deal with the trial time).

When one analyzes the matter of burden of proof, one must ask what was the legitimate expectation of a person charged with a crime who pled insane before the New Law? When Mr. Anderson was found insane that by itself did not determine the length of his

commitment. Such length is determined by the existence vel non of his mental illness and by the nature and extent of his dangerousness, if any. If he chose the judicial release route, incidentally, under the Old Law (and even the New Law) he knew he had the burden of proof (by a preponderance of the evidence), but he also knew that he had advantages too, such as to the right to a trial by jury. See, Daniel v. Supt., 34 Md. App. 173, 178-79 (1976). The New Law makes administrative hearings consistent with judicial release procedures. As I have said, the standard remains the same.

But balancing all of the competing factors, I conclude that the burden-shift is substantive, adverse to the Insanity Committee, and not outweighted by the administrative convenience to the State. Under the Old Law the Insanity Committee could simply sit back and win if the State

failed to prove its case by clear and convincing evidence. If there was a state of even balance, the Insanity Committee won. Under the New Law, the Insanity Committee loses. These changes make a real and significant difference.

But even assuring such adversity, the question is whether such adversity is allowable without violating statutory or constitutional imperatives. The reasoning in Sherrill inclines towards the allowance of the burden-shift even though some adversity may be encountered. As far as the New Law is concerned, Mr. Anderson was found insane (the equivalent of not criminally responsible by reason of insanity) before the effective date of the New Law and he was under commitment "on" July 1, 1984. Hence his release is subject to the burden of proof requirements of the New Law. As to constitutional considerations, let us now consider the

matters of the ex post facto and due process clauses.

III.

EX POST FACTO CONSIDERATIONS

The final question, then, is whether this adversity to the Insanity Committee, violates the ex post facto clause of the federal[7] and/or state[8] constitutions.

In order for a law to be ex post facto, it must be retrospective; that is, it must apply to events occurring before the enactment; and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981). At first blush, both elements would seem to be present in the instant case. The State seeks to apply the New Law to the 1981 determination of insanity

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a criminal act which occurred before the New Law went into effect.

7 U.S. Const., Art. 1., Sec. 9, Clause 3, Sec. 10, Clause 1.

of Mr. Anderson and it attaches a significantly heavier burden of proof to his disadvantage. This mix led New Hampshire to rule that retroactive shifting of the burden of proof violated its constitutional prohibition against ex post facto laws. State v. Ballou, 481 [N.E.] 2d 260 (N.H. 1984).

On the other hand, a law is only ex post facto if its purpose is punishment. Spielman v. State, 298 Md. 602 (1984). The New Law has treatment as its objective. The commitment order for Mr. Anderson specifically states that its purpose is care and treatment. While it is true that no one wants to be confined against his will anywhere,[9] it is also true that when one is an Insanity Acquittee, society can both treat him (against his will, if necessary) and

---

[8] Md. Decl. of Rts., Art. 17.

protect him and society from his potential dangerousness. Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 3051-52 (1983). In Jones, the Court held that an Insanity Acquittee could be hospitalized for treatment of his mental illness beyond the expiration of time of his sentence. Treatment was the paridigm even though incidental "punishment" may be involved. If one is not criminally convicted, he may not be criminally punished. While related in certain instances, punishment is different from treatment, and the law clearly recognizes this difference. Vitek v. Jones, 455 U.S. 480 (1980). Accord, Langworthy v. State, 284 Md. 588 (1979), cert denied; 450 U.S. 960 (1981), Pouncey v. State, 297 Md. 264 (1983).

There is a lot of language and holdings in the cases which indicate that the ex post facto prohibition is not violated because commitment is not considered punishment. See

People v. Buttes, 134 Cal. App. 3d 116, 184 Cal. Rptr. 497 (1982); People v. Valdez, 79 Ill. 2d 74, 402 N.E. 2d 187 (1980); People v. Thiem, 82 Ill. App. 3d 956, 403 N.E. 2d 647 (1980); In Re Clark, 86 Kansas 539, 121 P. 492 (1912); In the Matter of Rogers, 63 N.C. App. 705, 906 S.E. 2d 510 Appeal dismissed, 309 N.C. 622, 308 S.E. 2d 716 (1983); State v. Jackson, 2 Ohio App. 3d 11, 440 N.E. 2d 1199 (1981); Matter of Guardianship of Nelson, 98 Wis. 2d 261, 296 N.W. 2d 736 (1980). The minority of Courts that have found that changes in release/recommitment statutes were ex post facto have done so on the basis that these proceedings were criminal. Raimondo v. Pavkovic, 107 Ill. App. 3d 226, 437 N.E. 2d 712 (1982), and People v. Tedford, 109 Illinois App. 3d 195, 440 N.E. 2d 329 (1982); (holding of intermediate appellate Court of Illinois inconsistent with holding of Supreme Court of

Illinois in People v. Valdez, supra and People v. Thiem, supra); State v. Ballou, supra.

If one construes "punishment" broadly, it would encompass involuntary confinement in a mental institution. If one construes "punishment" narrowly, one would argue that it is not an offense to be "dangerous" and hence the "punishment" predicate for the application of the ex post facto prohibition would be lacking. The inquiry however, should not be confined to consideration of the positions of only two parties, i.e., the Insanity Committee and the Department. It should also consider the public. When one considers the public, one must think about the matter of dangerousness and the right of the public to be protected against the dangerousness of some of its members. As to how best to so protect the public, the legislative intent is clear -- when the

verdict on the general plea was guilty and the special verdict on the insanity plea was that the accused was insane, the trial judge had two courses under the Old Law: (a) either to turn the Insane Acquittee loose (as authorized by statute) or (b) commit him to the Department for examination and evaluate [sic] to determine, by the standards applicable to civil admission proceedings, (as per statute) whether he would be a danger to himself, or the safety of the person or property of others. Langworthy v. State, 284 Md. 588, 594 (1979). On the basis of that report (and other evidence) the Court may direct confinement for treatment. Id at 594. The "statutory scheme" in the above scenario deals with treatment as the sole method of protecting the public (and rehabilitating mental patients). This Court defers to the statutory scheme and thus concludes that the ex post facto Laws of the

federal and state constitutions are not violated. Committment on grounds of dangerousness is not punishment. It is imposed for the sake of safety, not for the sake of penal policy.

IV.

DUE PROCESS CONSIDERATIONS

Mr. Anderson argues that in the context of general civil commitment, due process requires a higher burden of proof than the preponderance standard, namely, the clear and convincing standard, citing Addington v. Texas, 441 U.S. 418 (1979). This is true. But in the case of Insanity Acquittees, they may be indefinitely committed following determination of insanity and it is not violative of due process to make them prove that they are no longer dangerous by a preponderance of the evidence. Jones v. United States, 462 U.S. 354, 103 S. Ct. 3043, 3051-52 (1983). In the process, Jones

distinguished Addington, pointing out important differences between civil commitment candidates and Insane Acquittees, which difference justifies different standards of proof (proof by an accused that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere "idiosyncratic behavior," Addington, 441 U.S., at 427).

Jones does not answer the instant question. But if it does not violate due process to:

a. Make a criminal accused establish insanity instead of requiring the government to prove sanity,

b. Make him do so by a preponderance of the evidence,

c. Confine an Insane Acquittee to a mental hospital until he regains his sanity or is no longer dangerous to himself or society.

d. Authorize confinement in a mental hospital for a period longer than he could have been incarcerated

then a strong argument can be made that due process is not violated by Maryland's burden-shifting New Law. Insane Acquittees do "constitute a special class that should be treated differently from other candidates for commitment." Jones, 460 U.S. 354, 103 S. Ct. at 3053. Legislatures should be allowed leeway when dealing "with the special problems raised by the insanity defense." Id. at 3053.

To conclude, the burden-shifting New Law, while affecting the Insanity Committee adversely, does not affect him unfairly, since it seeks to afford him treatment for his sake and for the sake of society. While it may deprive him of liberty, it does so for a legitimate purpose and hence does not offend standards of fundamental fairness.

For the foregoing reasons, it is, on this 7th day of March, 1985

ORDERED by the Circuit Court for

Baltimore City, that Mr. Anderson Motion to Strike Consent is hereby denied, and it is further

ORDERED, that Mr. Anderson's release be governed by the burden of proof requirements of the New Law.

Marshall A. Levin,
Judge

APPENDIX D:

ORDER OF THE
CIRCUIT COURT FOR BALTIMORE CITY
DATED JUNE 4, 1985

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
V.	*	FOR
	*	BALTIMORE CITY
CHARLES ANDERSON	*	IND: 18031909

****

ORDER OF CONTINUED COMMITMENT

After having been found not criminally responsible on April 8, 1981 the defendant was committed as a patient to the care and custody of the Department of Health and Mental Hygiene for an inpatient evaluation and was subsequently committed to the care or treatment of the Department.

An Administrative Hearing was conducted on March 21, 1985 at Clifton T. Perkins Hospital Center. The Hearing Examiner, Paul Jacobs, Esquire, recommended to this Court on March 29, 1985 that Charles Anderson be retained at the hospital for further care and treatment on the basis of the finding that

the patient had not proven eligibility for release by a preponderance of evidence.

Upon review of the recommendations of the Hearing Examiner and the summary of evidence and testimony provided therein, exceptions having been filed by the patient and after argument before this Court, the Circuit Court for Balimore City, Maryland, this 4th day of June, 1985:

FINDS, that Charles Anderson has not proven eligibility for release; and it further

FINDS, that by virtue of his mental disorder, Charles Anderson requires continued inpatient hospitalization in that he would be a danger to himself or the person or property of others if released; thus it is

ORDERED, that in accordance with the recommendation of the Hearing Officer, the patient, Charles Anderson shall remain committed to the Department of Health and Mental Hygiene until further order of court.

MARSHALL A. LEVIN
Circuit Court for
Baltimore City

APPENDIX E:

APPLICATION
FOR LEAVE TO APPEAL
TO THE COURT OF SPECIAL APPEALS
FILED JUNE 29, 1985

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
CHARLES ANDERSON	*	IND: 18031909

****

APPLICATION FOR LEAVE TO APPEAL
TO THE COURT OF SPECIAL APPEALS
(Filed June 29, 1985)

I. Introduction

Charles Anderson, by his attorneys, George M. Lipman and Michael O. Ramsey, Assistant Public Defenders, pursuant to Md. Health-General Code Ann. §12-113(e)(2) (1982), and Md. Health-General Code Ann. §12-113(e)(2) (Supp. 1984), requests leave to appeal the order of continued commitment entered by the Circuit Court for Baltimore City on June 4, 1985. The issue presented is the appropriate burden of proof in an administrative hearing and judicial review proceeding for release from a state hospital

initiated after July 1, 1984, by a person who had been found insane prior to July 1, 1984. This issue effects (sic) not only Mr. Anderson but also over one hundred persons found insane prior to July 1, 1984 and currently confined in state mental hospitals.

***

IV. Concise Statement of the Reasons Why the Lower Court's Judgment Should be Reversed.

B. It was a constitutionally prohibited application of ex post facto law for the lower court to require Mr. Anderson to prove his eligibility for release by a preponderance of the evidence.

The Court in Weaver v. Graham, 450 U.S. 24, 29 (1980) set forth the elements which must be present "for a criminal or penal law to be ex post facto; it must be retrospective, that is it must apply to events occurring before its enactment and it must disadvantage the offender affected by it". Md. Health-General Code Ann. §12-101 et seq. (Supp. 1984) is a criminal or penal statute in

that it provides for the criminal commitment to a mental hosptial of an individual found insane. Jones v. U.S., 463 U.S. 354, 103 S.Ct. 3043 (1983). Pouncey v. State, 207 Md. 264, 465 A.2d 475 (1983). Compare Addington v. Texas, 441 U.S. 418 (1979) and Md. Health-General Code Ann. §10-632 (Supp. 1984). The application of the statute by the lower court was retrospective in that it "substantially altered the consequences attached to a crime already completed". Weaver, 450 U.S. at 33. The imposition of the burden of proof disadvantaged Mr. Anderson in that his path to release was clearly made more difficult. See State v. Ballou, 481 A.2d 260 (N.H. 1984).

***

Respectfully sumbitted,

/s/
George M. Lipman

/s/
Michael O. Ramsey

APPENDIX F:

MARYLAND INSANITY COMMITMENT STATUTES

MARYLAND INSANITY COMMITMENT STATUTES

Pre-Existing Laws

MD. Health-General Code Ann. §12-113(b)(1) (1982)

(b) Committal. -- (1) The court shall order commitment to the Department for institutional, inpatient care or treatment if the court finds, on clear and convincing evidence, that the individual:

(i) Is mentally retarded or has a mental disorder; and

(ii) Because of mental retardation or a mental disorder, would be a danger to the individual or the person or property of another, if not confined.

MD. Health-General Code Ann. §12-114 (1982)

(a) Initial application. -- Six months after a court commits an individual under §12-113(b) of this title, the individual may apply for release as provided in subsection (b) or (c) of this section. The individual may not apply under both subsections.

(b) Administrative proceeding. -- (1) To apply for release under this subsection, the individual shall notify the court and State's attorney, in writing, of a request for an examination and evaluation to determine whether the individual:

(i) Is mentally retarded or has a mental disorder; and

(ii) Because of mental retardation or a mental disorder, would be a danger to the individual or the person or property of another, if a relased from

confinement with or without condition.

(2) On receipt of the notice, the court shall notify the Department to do the examination and evaluation within 20 days after the notice date.

(3) After the evaluation is done, the individual has the rights set forth in §§12-111 through 12-113 of this title.

(c) Judicial review. -- (1) To apply for release under this subsection, the individual shall file a petition for release in an equity court in the county where the individual was found not guilty by reason of insanity.

(2) A copy of the petition shall be sent to the State's attorney.

(3) If the individual requests trial by jury, the trial shall be held with a jury as in a civil action at law.

(4) The trier of fact shall:

(i) Consider whether the individual:

1. Is mentally retarded or has a mental disorder; and

2. Because of mental retardation or a mental disorder, would be a danger to the individual or the person or property of another, if released from confinement; and

(ii) Render a verdict for:

1. Continued confinement;

2. Conditional release; or

3. Unconditional release.

(5) Within 30 days after a verdict for conditional relase is rendered, the court shall release the individual on appropriate conditions.

(d) Later review. -- (1) After review under this section, an individual may reapply for release only once in any 1-year period, unless the individual

files, with the petition or request, an affidavit that shows an improvement in the mental condition of the individual after the review.

(2) An affidavit that another patient executes is not valid. (An. Code 1957, art. 59, §27C; 1982, ch. 21, §2.)

Post 1984 Statutes

MD. Health-General Code Ann. §12-101 Editor's Note (Supp.) 1984
Sections 4 and 5 of 1984 Md. Laws Ch. 501

Section 4 of Ch. 501 provides that "the provisons of this act shall be applicable to any case filed on or after the effective date of this act (July 1, 1984) and to any individual found not criminally responsible by reason of insanity or determined to be incompetent to stand trial who is under commitment to the Department of Health and Mental Hygiene on or after the effective date of this act (July 1, 1984); except that the initial commitment of an individual found to have been insane at the time of the commission of the criminal act under the law in effect before the effective date of this act (July 1, 1984) shall be governed by former §§12-110 through and including 12-113 of the Health-General Article as those sections applied on June 30, 1984.

Section 5 of Ch. 501 provides that the act shall take effect July 1, 1984.

MD. Health-General Code Ann. §12-111

(a) Commitment. -- Except as provided

in subsection (c) of this section, after a verdict of not criminally responsible, the court immediately shall commit the defendant to the Department for institutional, inpatient care or treatment.

(b) Disposition of mentally retarded. -- If the court commits a defendant who was found not criminally responsible primarily because of mental retardation, the Department shall designate a facility for mentally retarded individuals for care and treatment of the committed individual.

(c) Exceptions. -- After a verdict of not criminally responsible, a court may order that an individual be released, with or without conditions, instead of committed to the Department, but only if:

(1) The court has available an evaluation report within 90 days preceding the verdict made by an evaluating facility designated by the Department;

(2) The report indicates that the individual would not be a danger as a result of mental retardation or mental disorder, to self or to the person or property of others if released, with or without condition; and

(3) The individual and the State's Attorney agree to the release and to any condi;tions for release that the court imposes.

(d) Inclusion in central computer. -- The court shall notify the central repository of the criminal justice information system of each individual it orders committed under this section. (HG §12-110; 1984, ch. 501, §2, 1985, ch. 10, §3.)

MD. Health-General Code Ann. §12-113 (Supp. 1984)

(a) In general. -- A committed individual may be released under the provisions of this section and §§12-114 through 12-121 of this title.

(b) Eligibility -- Discharge. -- A committed individual is eligible for discharge from commitment only if that individual would not be a danger, as a result of mental disorder or mental retardation, to self or to the person or property of others if discharged.

(c) Same -- Conditional release. -- A committed individual is eligible for conditional release from commitment only if that individual would not be a danger, as a result of mental disorder or mental retardation, to self or to the person or property of others if released from confinement with conditions imposed by the court.

(d) Burden of proof. -- To be released, a committed individual has the burden to establish by a preponderance of the evidence eligibility for discharge or eligiblity for conditional release. (1984, ch. 501, §2.)

MD. Health-General Code Ann. §12-118 (Supp. 1984)

(a) Application -- Time. -- (1) Not earlier than 1 year after the initial release hearing ends or was waived, and not more than once a year thereafter, a committed individual may apply for release under either subsection (b) or (c) of this section, but not both.

(2) Notwithstanding the time restrictions in paragraph (1) of this subsection, a committed individual may file an application for release at any time if the application is accompanied by an affidavit of a physician or licensed psychologist that states an improvement in the mental condition of the committed individual since the last hearing.

(b) Administrative proceeding. -- (1) To apply for release under this subsection, the committed indivdiual shall file an application for release with the Department and notify the court and State's Attorney, in writing, of this request.

(2) The provisions of this title governing administrative hearing and judicial determination of eligibility for release apply to any application for release under this subsection.

(c) Judicial review. -- (1) To apply for release under this subsection, the committed individual shall file a petition for release with the court that ordered commitment.

(2) The committed individual shall send a copy of the petition for relase to the Department and the State's Attorney.

(3) If the committed individual requests a trial by jury, the trial shall be held in a circuit court with a jury as in a civil action at law.

he trier of fact shall:

(i) Determine whether the committed individual has proved eligibility for release by a preponderance of the evidence; and

(ii) Render a vedict for:

1. Continued commitment;
2. Conditional release; or
3. Discharge from commitment.

(5) If the court renders a verdict for conditional release, within 30 days after the verdict the court shall release the committed individual under conditions it imposes in accordance with specific recommendations for conditions under §12-115(b) of this title.

(d) Appeals. -- (1) An appeal from a District Court order shall be on the record in the circuit court.

(2) An appeal from a circuit court order shall be by application for leave to appeal to the Court of Special Appeals. (HG §12-114; 1984, ch. 501, §2.)

(2)

No. 87-699

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THE STATE OF MARYLAND,

Petitioners,

v.

CHARLES ANDERSON,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, CHARLES ANDERSON, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this Petition is attached hereto.

GEORGE E. BURNS, JR.
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place,
Baltimore, Maryland 21202
(301) 333-4842

Counsel for Petitioner

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF MARYLAND AND DEPARTMENT OF
HEALTH AND MENTAL HYGIENE OF THE
STATE OF MARYLAND,

Petitioners,

v.

CHARLES ANDERSON,

Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, CHARLES ANDERSON, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
Yes, in therapuhc workshop

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
Clifton T. Perkins Hospital workshop
$15.00 per week (approx.)

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? ___
no

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? yes

(a) If the answer is yes, state the total value of the items owned.
$800 savings in hospital account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
no

(a) If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

_____

_____

I understand that a false statement or answer to my questions in th is affidavit will subject me to penalties for perjury.

Charles Anderson
CHARLES ANDERSON

Subscribed and sworn to before me, a Notary Public this 27th day of JANUARY, 1988.

Ilene L Sherman
NOTARY PUBLIC

My Commission Expires:
July, 1990

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
JUSTICE

No. 87-699

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF MARYLAND AND DEPARTMENT OF
HEALTH AND MENTAL HYGIENE OF THE
STATE OF MARYLAND,

Petitioners,

v.

CHARLES ANDERSON,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

Alan H. Murrell
Public Defender

George E. Burns, Jr.
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842

George M. Lipman
Assistant Public Defender

Attorneys for Respondent

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ISSUE PRESENTED

Does the ex post facto clause prohibit a change in the burden of proof used to determine whether one committed to a maximum security mental hosptial on the basis of being found not guilty by reason of insanity is entitled to release?

NO. 87-699

IN THE

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1987

THE STATE OF MARYLAND AND DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THE STATE OF MARYLAND,

Petitioners,

v.

CHARLES ANDERSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, by his attorneys, George E. Burns, Jr., and George M. Lipman, Assistant Public Defenders, requests that the Petition for Writ of Certiorari denied because no substantial federal question warranting review has been presented.

STATEMENT OF THE CASE

The relevant facts are set forth in the Petition for Writ of Certiorari and the opinion of the Court of Appeals included as Appendix A to the Petition.

REASONS FOR DENYING THE PETITION

I.

THE EX POST FACTO CLAUSE PROHIBITS A CHANGE IN THE BURDEN OF PROOF USED TO DETERMINE WHETHER ONE COMMITTED TO A MAXIMUM SECURITY MENTAL HOSPITAL ON THE BASIS OF BEING FOUND NOT GUILTY BY REASON OF INSANITY IS ENTITLED TO RELEASE.

Most aspects of ex post facto law were conceded by the State of Maryland prior to the decision of the Court of Appeals. Indeed, the Court of Appeals noted that the actual question in dispute was very narrow.

> The State, while not disputing that the the change in the burden of proof operates to Anderson's disadvantage, contends that the ex post facto prohibition is inapplicable because his confinement in a mental hospital does not constitute "punishment." (Petition at 11A).

Further, the resolution of this limited question by the Court of Appeals turned on the construction of Maryland law.

> Considering the nature of that confinement under Maryland law, and particularly the fact that it represents the disposition portion of an adverse judgment in a criminal case, ... we believe that the confinement does implicate the ex post facto prohibition. (Citation omitted.) (Petition at 28A.)

The Court's conclusion is simply a recognition of the reality of Maryland law. See Pouncey v. State, 297 Md. 264, 270, 465 A.2d 475 (1983) ("[t]he legislature, however, has not seen fit to remove all consequences of committing a

criminal act while insane"). Noteworthy, among these consequences is confinement[1] subject to the application of Maryland Code, Article 27, §139(a)(3) (1987 Cum. Supp.):

> If any individual escapes from a facility of the Department of Health and Mental Hygiene after commitment as incompetent to stand trial or not criminally responsible, the individual is guilty of a felony and on conviction is subject to confinement in the State penitentiary or a jail or house of correction for a period not exceeding 10 years.

It is difficult to see how branding a reluctant "patient" a felon, and sentencing him to ten years imprisonment, is a rational part of psychiatric treatment. In light of the classically penal aspect of Respondent's confinement, it is clear why that the Court of Appeals concluded that, under Maryland law, punishment as well as treatment underpins the confinement of criminal committees.

The holding of the Court of Appeals is also consistent with this Court's holdings. In Jones v. United States, 463 U.S. 354 (1983), this Court concluded that due process did not require that the procedures governing the commitment and release of those committed as a result of criminal

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[1] Confinement is at the Clifton T. Perkins Hospital Center.

> This is a maximum security hospital; its purpose is to receive persons committed as a result of criminal prosecution or inmates from prisons who need psychiatric hospitalization. (Petition at 25A-26A.)

proceedings, and those committed as a result of civil proceedings be identical, the reason being the criminal committee has been found to have committed an act that constitutes a criminal offense. Id. at 363-366. Thus, the reason that the State of Maryland may constitutionally make the conditions of the criminal committee's confinement and release more onerous rests on of his status as a "criminal."

In sum, the decision of the Court of Appeals rests on the amply supported conclusion that Respondent is being punished as well as treated because he was found to have committed a criminal act. It is at best doubtful whether this decision involves a federal question. See Lindsey v. Washington, 301 U.S. 397, 400 (1937) (in applying ex post facto prohibition to State laws, Supreme Court accepts meaning ascribed to such laws by the highest court of the State). In any event, the decision of the Court of Appeals is nothing more than a simple application of the ex post facto clause as summarized by this Court last term.

> Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." See Art. I, §9, cl. 3; Art. I, §10, cl. 1. Our understanding of what is meant by ex post facto largely derives from the case of Calder v. Bull, 3 Dall. 386 (1798), in which this Court first considered the scope of the ex post facto prohibition. In Calder, Justice Chase noting that the expression "ex post facto" "had been in use long before the revolution," id., at 391, summarized his understanding of what fell "within the words and the intent of the prohibition":
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> "1st. Every law that makes an action done before the passing of the law, and

> which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Id., at 390, 1 L.Ed. 648 (emphasis omitted).

Miller v. Florida, U.S. ___, 96 L.Ed.2d 351, 359 (1987).

CONCLUSION

The State of Maryland is without question aggrieved; however, it has offered no substantial reason as to why this Court should consider its grievances. The Petition should, therefore, be denied.

Respectfully submitted,

Alan H. Murrell
Public Defender

George E. Burns, Jr.
Assistant Public Defender

George M. Lipman
Assistant Public Defender

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 29th day of January, 1988, a copy of the foregoing Brief and Appendix in Opposition to Petition for Writ of Certiorari was delivered to C. Frederick Ryland, Assistant Attorney General, 300 West Preston Street, Suite 302, Baltimore, Maryland 21201, Counsel for Petitioners.

George E. Burns, Jr.
Assistant Public Defender

George M. Lipman
Assistant Public Defender